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No. 405.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY, a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court of the Ninth Judicial Circuit, in and for the Northern District of California.

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In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES,
Complainant,
vs.
THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation), and L. L. MEYER, its Superintendent,*
Respondent.
} Bill in Equity.

Bill of Complaint.

The United States of America, by Judson Harmon, Attorney General of the United States, brings this bill against the North Bloomfield Gravel Mining Company, a corporation, and L. L. Meyer, its superintendent,* and thereupon your orator complains and says:

I.

That heretofore, and under and by virtue of an act of Congress entitled, "An Act to create the California Debris Commission, and regulate hydraulic mining in the State of California," approved March 1, 1893, the President of the United States, by and with the advice of the Senate thereof, duly appointed from officers of the corps

*Amended. W. B. B., Dep. Clerk.

of engineers of the United States army, Colonel George H. Mendell, Lieutenant-Colonel W. H. H. Benyaurd, and Major W. H. Heuer, as a commission to be, and be known as, such "California Debris Commission," heretofore provided for as aforesaid; that said officers did immediately thereafter duly qualify and enter upon their duty as members of such commission; that their said appointments have not been revoked, but have ever since been, and now are, in full force and effect, and the said Colonel George H. Mendell, Lieutenant-Colonel W. H. H. Benyaurd, and Major W. H. Heuer have been and constitute, since said appointments, and now are and constitute, the duly appointed, qualified, and acting California Debris Commission; that said Commission, within thirty days after such appointments, duly organized, by the selection of such officers from the members thereof as were required in the performance of its duties, and by the adoption of rules and regulations and the prescription of a method of procedure to govern its deliberations and the conduct of its work, under the provisions of said act; and thereupon the said commission became and was, and now is, invested with jurisdiction over all mining carried on by the hydraulic process, as the same is hereinafter defined, in the territory drained by the Sacramento and San Joaquin river systems in said State and Northern District of California.

II.

That the said North Bloomfield Gravel Mining Company is, and at all the times herein mentioned was, a cor-

poration duly organized and existing under and by virtue of the laws of said State of California, for the purpose of mining for gold, having its principal place of business at the city and county of San Francisco, and its works, gold mines, and mining grounds, owned, possessed, and operated by it, as hereinafter mentioned, at and near the town of North Bloomfield, in Nevada county, all in said State and Northern District of California; and that the said L. L. Meyer is the superintendent of said works, gold mines, and mining claims of said respondent company.*

III.

That the said works, gold mines, and mining grounds possessed, owned, and operated by said respondent, the North Bloomfield Gravel Mining Company, are so mined and operated by the hydraulic process of mining, and none other, as hereinafter defined; and are, and each and every part thereof, is situated on and near the Yuba river and its different forks and tributary branches and streams, and are, and each and every part of said works, gold mines, and mining claims, is situated in and is a portion of the said territory drained by the Sacramento and San Joaquin river systems in said State and Northern District of California.

IV.

That the waters of the Sacramento river flow into Suisun bay, and from thence through the straits of Carquinez into San Pablo bay, and from thence through the

*Amended. W. B. B., Dep. Clerk.

Golden Gate into the Pacific Ocean; that Feather river flows into said Sacramento river, and that Yuba river flows into said Feather river; that said rivers, bays, and straits are wholly within said Northern District of California; that the said Sacramento, Feather, and Yuba rivers were at the time of the cession of the territory of Upper California to the United States by the Republic of Mexico, to-wit, on the 2d day of February, 1848, ever since have been, and now are, public navigable rivers, and free highways for the uses and purposes of commerce and navigation, and during all that time were, and still are, navigated and navigable, as hereinafter stated, by steamboats and other vessels engaged in commerce and navigation within said State, and drawing from eight to sixteen feet of water.

That the said Sacramento river, during all the time aforesaid, was, and still is, so navigable, and navigated by steamboats and other vessels between its mouth and the mouth of Middle creek, in Shasta county, above the point of confluence of said Sacramento and Feather rivers.

That said Feather river, during all said time, was, and still is, so navigable between its mouth and the mouth of said Yuba river.

That said Yuba river, during all said time, was, and still is, so navigable from its mouth to a point about one mile above its mouth.

That all of said rivers have their principal sources in the western slope of the Sierra Nevada Mountains, which lie to the east and the northeast of the Sacramento valley, through which the Sacramento river flows, and in a

small part in the eastern slope of the Coast Range Mountains, which lie to the west of said valley; that all the waters of said western slope of said Sierra Nevada Mountains which lies opposite to said Sacramento valley are tributary to said rivers; that they have their sources in lakes, springs, small streams, and canyons, which receive their waters from the rain and snow which fall each year to a great depth upon said mountains.

That the said North Bloomfield Gravel Mining Company so dumps and discharges the mining debris from said works, gold mines, and mining grounds in such manner that the same, or a portion thereof, is ultimately carried and flows into the said Yuba river, its said forks and streams, and, with the mining debris from other works, gold mines, and mining grounds so operated by the hydraulic process of mining, as hereinafter defined, is thence so carried and flows into the said Feather, Sacramento and other rivers and streams forming a part of and tributary to said Sacramento river system, and thence into the other waters, bays, and straits hereinbefore mentioned.

V.

That hydraulic mining, as it is now, and for more than twenty years last past has been, conducted, practiced, and understood in said State, is a process or mode of gold mining, by which hills, ridges, banks, and other forms of deposits of earth, which contain gold, and are known as gold mines, are mined and removed from their position

by means of large streams of water, which by great pressure are forced through pipes terminating in nozzles, generally known as monitors or little giants; that the water is discharged from such nozzles with great force by a water pressure of from fifty to four hundred feet per second, against and upon such hills, ridges, banks, and other deposits, which are usually or frequently shattered or broken up by means of blasts of powder, and softened by running water over and along such shattered and broken banks of earth, and undermined by streams of water flowing at the foot of such banks, thus caving down and washing off portions of such banks, before water is discharged from said nozzles against such banks, as aforesaid; that the clay, sand, gravel, stones, rocks, and boulders of which such gold mines are composed, and which are known as, and in this bill are denominated, mining de bris, together with the gold contained therein, are car ried and moved by said streams, or by streams of water which are caused to flow over said banks without pressure, into and through flumes, sluices, and other con duits, at or adjacent to the respective works, mines, and mining claims.

That the gold contained in or mingled with such mining debris is arrested in such flumes, sluices, conduits, or other appliances for saving the gold, and the mining debris is carried and propelled by such streams of water through the said flumes, sluices, and conduits, and dumped or discharged into impounding basins and reservoirs, and a part of said mining debris is thence carried and flows into the adjacent streams or canyons, or some

places near to them, from which it is carried and moved by the water into such streams or canyons.

That the larger and heavier portions of said mining debris are deposited and lodged in said basins impounding reservoirs, or works, and the smaller and lighter portions thereof, being not less than fifty per cent of said mining debris, carried down said streams and lodged and deposited in said rivers, their channels and the lands adjacent thereto.

That a portion of such mining debris, ever since the commencement of hydraulic mining, as aforesaid, at and adjacent to the streams and canyons aforesaid, has, during a large part of each year, been deposited and lodged, and is still being deposited and lodged in the beds and channels of said rivers, and will continue to be so deposited and lodged while such hydraulic mining continues.

VI.

That the said North Bloomfield Gravel Mining Company and said L. L. Meyer, its superintendent, and each thereof,* has at all of said times failed, neglected, and refused, and now does utterly fail, neglect, and refuse, to file with said California Debris Commission a verified, or any petition, setting forth such facts as will comply with the said act, and the rules prescribed by said commission, or either or at all, as in and by said act, in section 9 thereof, is provided, and has [have*] not, nor has either thereof,* nor has anyone on its [their or either of their*] behalf, executed and acknowledged a deed or oth-

*Amended. W. B. B., Dep. Clerk.

er instrument, whereby the said North Bloomfield Gravel Mining Company surrenders to said United States the right or privilege to regulate by law the manner or method in which the debris, or a portion thereof, resulting from the working or operation of said works, gold mines, or mining grounds, by said process, shall be restrained or what amount shall be produced therefrom; although the said North Bloomfield Gravel Mining Company [and L. L. Meyer, its superintendent have*] has been at said times, and now is [are], engaged in mining by the said hydraulic process at said works, gold mines, and mining grounds, as aforesaid.

Wherefore, your orator prays that a writ of injunction may issue out of and under the seal of this honorable Court, directed to these respondent, and each thereof,* perpetually enjoining and restraining it, its [their, and each of them, their*] agents, grantees, lessees, and employees, from continuing to operate, and from operating or suffering or allowing to be operated, by the said hydraulic process, its said works, mines, and mining grounds, until it [they*], the said respondent, or either thereof, in behalf of both* shall make, present, and file with said California Debris Commission, its [their*] said verified petition, setting forth such facts as will comply with said law and the rules prescribed by said California Debris Commission, accompanied by said deed or instrument, duly executed and acknowledged, as required by the law of said State of California, whereby the said North Bloomfield Gravel Mining Company, as aforesaid, surrenders to

*Amended. W. B. B., Dep. Clerk.

the said United States the right and privilege to regulate by law, as provided in said act, or any law that may be hereafter enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the said debris, resulting from the working and operation by the said hydraulic process of said mines and mining claims, shall be restrained, and what amount shall be produced therefrom; and that your orator may have such other or further relief in the premises as to the Court may seem meet.

And may it please the Court to grant unto your orator a writ of subpoena, issuing out of and under the seal of this Honorable Court, directed to each* of said respondent, commanding it [them and each of them*], on a day certain therein to be named, and under a certain penalty, to be and appear in this Honorable Court, then and there to answer, under oath, all and singular the premises, and to stand and to perform and abide such order, direction, and decree as may be made against it [them, or either of them*], and your orator in duty bound will ever pray.

JUDSON HARMON,
Attorney General.

H. S. FOOTE,
United States Attorney.

SAMUEL KNIGHT,
Asst. United States Attorney, Solicitors for Complainant.

[Endorsed]: Bill. Filed June 19th, 1895. W. J. Costigan, Clerk.

*Amended. W. B. B., Dep. Clerk.

UNITED STATES OF AMERICA

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

Subpoena ad Respondendum.

The President of the United States of America, Greeting, to the North Bloomfield Gravel Mining Company, a Corporation, and L. L. Meyer, its Superintendent:

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in San Francisco, on the fifth day of August, A. D. 1895, to answer a bill of complaint exhibited against you in said court by the United States of America, and to do and receive what the said Court shall have considered in that behalf, and this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 19th day of June, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the 119th.

[Seal] W. J. COSTIGAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.—You are hereby required to enter your appearance in the above suit, on or before the first Monday of August next, at the clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

W. J. COSTIGAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]:

United States Marshal's Office, }
Northern District of California. }

I hereby certify that I received the within writ on the 17th day of June, 1895, and personally served the same on the North Bloomfield Gravel Mining Company, a corporation, on the 20th day of June, 1895, by delivering to and leaving with Henry Pichoir, secretary of the said North Bloomfield Gravel Mining Company, a corporation, said defendant named therein, at the city and county of San Francisco, in said district, an attested copy thereof.

San Francisco, June 24, 1895.

BARRY BALDWIN,
U. S. Marshal.
By J. A. Littlefield,
Deputy.

I further certify that I served the same upon L. L. Meyer, its superintendent, by delivering to and leaving with T. L. Ford, Esq., attorney for said L. L. Meyer, its superintendent (as per instructions from United States attorney), an attested copy thereof.

BARRY BALDWIN,
U. S. Marshal.
J. A. Littlefield,
Deputy.

[Endorsed]: Subpoena ad respondendum. Filed July 9th, 1895. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

IN EQUITY.

THE UNITED STATES OF AMERICA, Complainant, vs. THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation), and L. L. MEYERS, Its Superintendent, Defendants.	No. 12,086.

Demurrer of the North Bloomfield Gravel Mining Company.

The demurrer of the North Bloomfield Gravel Mining Company, a defendant in the above-entitled cause, to the bill of complaint of the United States of America, the above-named plaintiff.

This defendant, the North Bloomfield Gravel Mining Company, a corporation, by protestation, not confessing all or any of the matters and things in the plaintiff's amended bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to the said bill, and for cause of demurrer showeth:

I.

That plaintiff hath not, in and by its said bill, made or stated such a cause as entitles it, in a court of equity, to any discovery from this defendant, or to any relief against it, as to the matters contained in said bill, or any of such matters.

II.

That defendant L. L. Meyers, the superintendent of said corporation, is in said bill of complaint improperly joined as defendant with said North Bloomfield Gravel Mining Company, in this, to-wit, that said L. L. Meyers is joined as a party defendant with the said North Bloomfield Grav-

el Mining Company in said bill of complaint, solely as and because he is superintendent of said North Bloomfield Gravel Mining Company, and that said L. L. Meyers is not a proper or necessary party to said suit, or to any relief sought in or by said bill of complaint.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the said defendant, the North Bloomfield Gravel Mining Company, doth demur thereto, and humbly demands the judgment of this Court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges, in this behalf most wrongfully sustained.

CROSS, FORD, KELLY & ABBOTT,
Solicitors for the Defendant, the North Bloomfield Gravel Mining Company.

State of California,
City and County of San Francisco. } ss.

Henry Pichoir, being first duly sworn according to law, deposes and says that he is the secretary of the North Bloomfield Gravel Mining Company, the above-named defendant; that the foregoing demurrer is not interposed for delay.

H. PICHOIR.

Subscribed and sworn to before me this 3d day of August, A. D. 1895.

[Seal] JAMES MASON,
Notary Public.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

CROSS, FORD, KELLY & ABBOTT,

Solicitors for Respondent, the North Bloomfield Gravel Mining Company.

[Endorsed]: Demurrer of North Bloomfield Gravel Mining Co. Filed August 3, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Dep. Clk.

In the United States Circuit Court, Northern District of California.

UNITED STATES OF AMERICA,
Complainant,
vs.
THE NORTH BLOOMFIELD GRAVEL MINING COMPANY and L. L. MEYER,
Defendants.

Motion of L. L. Meyers to Strike Out, etc.

Now comes the said defendant L. L. Meyer, and moves the Court to strike the said defendant from the bill of complaint in said cause, on the ground that the said Meyer is not a necessary or proper party to said suit.

CROSS, FORD, KELLY & ABBOTT,

Solicitors for said Defendant, L. L. Meyer.

[Endorsed]: Motion of L. L. Meyer to strike him from the bill of complaint. Filed August 3d 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,
vs.
THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation), and L. L. MEYERS, Its Superintendent,
Defendants.
} No. 12,086.

Demurrer of L. L. Meyers.

The demurrer of L. L. Meyers, a defendant in the above-entitled cause, to the bill of complaint of the United States of America, the above-named plaintiff.

This defendant L. L. Meyers, by protestation, not confessing all or any of the matters and things in the plaintiff's amended bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth:

I.

That plaintiff hath not, in and by its said bill, made/or stated such a cause as entitles it, in a court of equity, to

any discovery from this defendant, or to any relief against him, as to the matters contained in said bill, or any of such matters.

II.

That defendant L. L. Meyers, the superintendent of said corporation, is in said bill of complaint improperly joined as defendant with said North Bloomfield Gravel Mining Company, in this, to-wit, that said L. L. Meyer is joined as a party defendant with the said North Bloomfield Gravel Mining Company in said bill of complaint, solely as and because he is superintendent of said North Bloomfield Gravel Mining Company, and that said L. L. Meyers is not a proper or necessary party to said suit, or to any relief sought in or by said bill of complaint.

Wherefore, and for divers other good causes of demurrer appearing in said bill, the said defendant L. L. Meyers doth demur thereto, and humbly demands the judgment of this Court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

CROSS, FORD, KELLY & ABBOTT,
Solicitors for the Defendant L. L. Meyers.

State of California,
County of Nevada. } ss.

L. L. Meyers, being first duly sworn according to law, deposes and says that he is the above-named defendant; that the foregoing demurrer is not interposed for delay.

L. L. MEYERS.

Subscribed and sworn to before me this 5 day of August, A. D. 1895.

[Seal] I. J. ROLFE,
Notary Public.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

CROSS, FORD, KELLY & ABBOTT,
Solicitors for Respondent L. L. Meyers.

Due service of the within demurrer and receipt of a copy thereof is hereby admitted this 6th day of August, 1895.

H. S. FOOTE,
Attorney for U. S. A.

[Endorsed]: Demurrer of L. L. Meyers. Filed August 7, 1895. W. J. Costigan Clerk. By W. B. Beaizley Deputy Clerk.

At a stated term, to-wit, the November term, A. D. 1895, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 16th day of December, in the year of our Lord, one thousand eight hundred and ninety-five.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

THE UNITED STATES,

vs.

NORTH BLOOMFIELD GRAVEL MINING COMPANY, et al. } No. 12086.

Order Granting Motion of Defendant Meyers to be Dismissed from Bill.

The motion of the defendant Meyers to be dismissed from the bill herein, having been heretofore submitted, and having been fully considered, the Court delivered its oral opinion, and ordered that said motion be, and the same hereby is, granted.

Upon motion of H. S. Foote, Esq., U. S. Attorney, it was ordered that the complainant have leave to amend the bill of complaint herein within twenty days, if it be so advised.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation),
Defendant.
No. 12,086.

Demurrer of North Bloomfield Gravel Mining Company.

Demurrer of the North Bloomfield Gravel Mining Company, defendant in the above-entitled cause, to the bill of complaint of the United States of America, the above-named complainant.

This defendant, the North Bloomfield Gravel Mining Company, a corporation, by protestation, not confessing all or any of the matters and things in the complainant's last amended bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth:

That the said complainant hath not, in and by its said bill, made or stated such a cause as entitles it in a court of equity to any discovery from this defendant, or to any relief against said defendant, as to the matters contained in said bill, or of any such matters.

Wherefore, and for divers other good causes of demurrer, appearing in said bill, the said defendant, the North Bloomfield Gravel Mining Company, doth demur thereto, and humbly demands the judgment of this Court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

CROSS, FORD, KELLY & ABBOTT,
Solicitors for the Defendant, the North Bloomfield Gravel Mining Company.

State of California,
City and County of San Francisco. } ss.

Henry Pichoir, being first duly sworn according to law, deposes and says that he is the secretary of the above-named corporation defendant, the North Bloomfield Gravel Mining Company; that the foregoing demurrer is not interposed for delay.

H. PICHOIR.

Subscribed and sworn to before me this 9th day of January, A. D. 1896.

[Seal] GEO. T. KNOX,
Notary Public.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

CROSS, FORD, KELLY & ABBOTT,

Solicitors for Defendant, the North Bloomfield Gravel Mining Company.

Rec'd this day a copy of the within demurrer.

H. S. FOOTE,

U. S. Atty.

[Endorsed]: Filed January 9th, 1896. W. J. Costigan, Clerk.

At a stated term, to-wit, the February term, A. D. 1896, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 9th day of March, in the year of our Lord, one thousand eight hundred and ninety-six.

Present The Honorable JOSEPH McKENNA, Circuit Judge.

THE UNITED STATES,

vs.

NORTH BLOOMFIELD GRAVEL MINING CO. } No. 12,086.

Order Overruling Demurrer of North Bloomfield Gravel Mining Company.

The demurrer of the defendant to the bill of complaint herein came on this day to be heard, Samuel Knight, Esq., Assistant U. S. Attorney appearing for complainant, and C. W. Cross, Esq., appearing for defendant, and was argued and submitted to the Court for consideration and decision. And the same having been fully considered, it is ordered that said demurrer be and the same hereby is overruled, with leave to the defendant to plead or answer on or before next rule day as he may elect.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY.

THE UNITED STATES,
Complainant,
vs.
THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation),
Respondent.

Answer of North Bloomfield Gravel Mining Company.

The answer of the North Bloomfield Gravel Mining Company, a corporation, the respondent, to the bill of complaint of the United States, complainant.

This respondent now, and at all times hereafter, saving to itself all, and all manner of, benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this respondent is advised it is material or necessary for it to make answer to, answering, saith:

I.

Said respondent admits to be true all of the allegations contained in paragraph one of said complainant's bill of complaint, except that the said respondent denies that the said California Debris Commission became and was, or ever became or was, or ever has been, or now is, invested with the jurisdiction of all mining carried on by the hydraulic process in the territory drained by the Sacramento and the San Joaquin river systems in the State of California or in the Northern District of California.

II.

And the said respondent further admits that it is now, and at all times mentioned in said bill of complaint was,

a corporation, organized and existing under and by virtue of the laws of the State of California, for the purpose of mining for gold, and having its principal place of business at the city and county of San Francisco, and its works, gold mine, and mining grounds owned, possessed, and operated by it, at and near the town of North Bloomfield, in Nevada county, all within said State of California and within the Northern District of California.

III.

And the said respondent further admits that the said works, gold mine, and mining grounds possessed, owned, and operated by said respondent, North Bloomfield Gravel Mining Company, are so mined and operated by the hydraulic process of mining, but denies that each and every part thereof, or any part thereof, is situated on and near Yuba river and its different forks, or any of them, but avers that said works and mines are all situated adjacent to a tributary of one of the Yuba rivers, namely Humbug creek, which is a small tributary of one of the main branches of the said Yuba river, but the respondent admits that the said mines and works are situated within territory drained by the Sacramento river system, and within the said State of California and the Northern District of California.

IV.

And the said respondent further admits that the waters of the Sacramento river flow into Suisun bay, and from

thence through the Straits of Carquinez into San Pablo bay and from thence through the Golden Gate into the Pacific Ocean; that the Feather river flows into said Sacramento river; and that the Yuba river flows into said Feather river; and that said rivers, bays, and straits are wholly within said Northern District of California. Admits that the said Sacramento, Feather, and Yuba rivers were, at the time of the cession of the territory of Upper California to the United States by the Republic of Mexico, to-wit, on the second day of February, 1848, ever since have been, and now are, public navigable rivers, and free highways for the use and purpose of commerce and navigation; but denies that the whole of the said Yuba river is, or ever was, a navigable river or a free highway for the use and purposes of commerce and navigation; but, on the contrary, avers that no portion of said Yuba river ever was, or has been, a public navigable river, or a free highway for the use and purpose of commerce and navigation, except that portion of said Yuba river extending from its mouth up stream a distance of about one-half mile or thereabouts; but denies that the said streams are, or ever have been, navigated or navigable by steamboats and other vessels engaged in commerce and navigation within said State, and drawing from eight to sixteen feet of water; but, on the contrary, avers that at ordinary low stages of water in said streams the Sacramento river is, and has been, navigable only for steamers drawing about four feet or less of water, and the said Feather river, for steamers drawing from eighteen inches to two feet of water, and the said Yuba river, at ordinary low stages,

from its mouth up, for more than thirty years has not been navigable for steamers of any draught whatever, or at all.

V.

And this respondent further admits that all of said rivers have their principal sources in the western slope of the Sierra Nevada mountains, which lie in the east and northeast of the Sacramento valley, through which the Sacramento river flows. Admits that all the waters of said western slope of said Sierra Nevada mountains which lies opposite to the said Sacramento valley are tributary to said rivers, and that they have their sources in lakes, springs, small streams, and canyons, which receive their waters from the rain and snow which fall each year to a great depth upon said mountains.

VI.

And the said respondent further denies that it so dumps and discharges the mining debris from its said works, gold mines, and mining grounds, or either or any of them, in such manner that the same or any material portion thereof is ultimately carried or flows into the said Yuba river, its said forks and streams, or that with mining debris from other works, gold mines, and mining grounds so operated by the hydraulic process of mining is then or at all so carried, or flows into, the said Feather, Sacramento, or other rivers or streams forming a part of, or tributary to, said Sacramento river system, and thence into other waters, bays, or straits in said bill of complaint mentioned.

VII.

And the said respondent admits the allegations in paragraph one of subdivision V of said bill of complaint to be true, but as to the allegations contained in paragraph two of said subdivision V, the said respondent says that it admits that the gold contained in, or mingled with, such mining debris is arrested in such flumes, sluices, conduits, or other appliances for saving gold, and that the mining debris is carried and propelled by such streams of water through the said flumes, sluices, and conduits, and, as to the respondent and its mines, dumped and discharged into impounding basins and reservoirs; but the said respondent avers that no material part of the mining debris from its mines, mining grounds, or works is carried thence from said impounding works, or flows into the adjacent streams or canyons, or some place or any place near to them, from which it is carried or moved by the water into such stream or canyons. And the respondent admits that the larger and heavier portions of said mining debris from its said mines, mining grounds, and works are deposited and lodged in said impounding basins, impounding reservoirs, or works, and admits that an immaterial quantity of the smaller or lighter portions thereof are carried down said streams, but denies that the same or fifty per cent of said mining debris, or any portion whatever of said mining debris, is lodged or deposited in said rivers, or any of them, or in their channels, or any of them, or on the lands adjacent thereto, or any of them, but, on the contrary, avers that only a trifling quantity of such mining debris escapes

from, or passes beyond, the impounding works and reservoirs of said respondent, and that the same consists solely of light, flocculent matter, of about the same specific gravity as water, and so finely comminuted as to readily float in, and be moved forward by, the slightest movement of the water in which it is suspended, and that all of said matter so escaping from or passing beyond respondent's impounding works, is carried in suspension in the streams of water of said streams until it reaches the Suisun bay, and that from the head of Suisun bay, by the tidal currents and movements of the water of said Suisun bay, Carquinez straits, San Pablo bay, and the bay of San Francisco, and the tidal currents passing in and out of the Golden Gate, it is all carried and swept into the ocean at distances remote from the land or navigable streams of the State of California, and does not deposit in any place where it either injures or threatens to injure any navigable waters within the jurisdiction of the United States; and the respondent further denies that any portion of the mining debris from its mines, mining grounds, or mining works, at any time since the passage of the Congress of the United States of the act entitled, "An act to create the California Debris Commission and regulate hydraulic mining in the State of California," has, during a large part of each year, or any part of any year, or at all, been deposited or lodged, or is still being deposited or lodged, in the beds and channels, or the beds or bed, or channels or channel, of said rivers or any of said rivers, and further denies that the same will continue to be so deposited or lodged from said respondent's said mines, mining

grounds, or works while such hydraulic mining continues, or otherwise, or at all.

VIII.

And the said respondent admits that the said North Bloomfield Gravel Mining Company has at all times failed, neglected, and refused, and still does utterly fail, neglect, and refuse, to file with said California Debris Commission a verified or any petition, setting forth such facts as will comply with the said act and the rules prescribed by said commission, or at all, either as prescribed in section nine of said act, or any other section thereof, and further admits that it has not, nor has any one on its behalf, executed or acknowledged any deed or other instrument, whereby the said respondent surrendered or surrenders to said United States the right or privilege to regulate by law the manner or method in which the debris or a portion thereof, or any portion thereof, resulting from the working or operating of said works, gold mines, or mining gounds, by said process, shall be restrained, or what amount shall be produced therefrom.

IX.

And further answering, the said respondent alleges that it is not bound to file such or any petition with said California Debris Commission, or such or any deed or written instrument, acknowledged or otherwise, or at all, with said California Debris Commission, but avers that under the said act entitled, "An act to create the California Debris

Commission and regulate hydraulic mining in the State of California," that it has an option to or not to make or file, or present to or with said California Debris Commission, a petition and written deed or other instrument in writing, such as is referred to in paragraph six of said complainant's bill of complaint.

X.

And further answering, the said respondent avers that many years ago, to-wit, about the years 1887 and 1888, the said respondent erected upon lands owned by it, and which had been granted to it for placer mining purposes in fee by the United States government by the patent of said government duly executed by the President of the United States, extensive, complete, and expensive impounding works, which impounding works are so constructed and maintained, and ever since have been so maintained, as to successfully, completely, and permanently impound all of the mining debris resulting from its mining operations upon the mines, mining grounds, and works described in the said bill of complaint or referred to therein and all other mines, mining grounds, and mining works owned by it, except such light and inconsiderable portion of said mining debris as will not settle in water when affected by the least motion, neither when such water is at rest, except the same be maintained in a condition of rest for a long period of time; and that such light and trifling matter, which is exceedingly flocculent in its nature, when it pass-

es from said impounding works, flows into Humbug creek; that said Humbug creek flows with a rapid current into the South Yuba river, and that the South Yuba river flows with a rapid current into the main Yuba river; that the main Yuba river flows with a rapid current into the Feather river, and that the Feather river flows with a rapid current into the Sacramento river; that the Sacramento river, with a moderate current, flows into Suisun bay, and that from the head of Suisun bay to the waters remote from the Golden Gate the waters are constantly agitated and rapidly moved by tidal currents, and that the said light and flocculent matter which so escapes from said respondent's impounding works is carried by the currents of said streams, and by the tidal currents in said other navigable waters, out of the Golden Gate and to localities remote from the shores of the Pacific Ocean, and that neither the same nor any part thereof does or threatens, either by itself or in connection with debris from other mines, to injure any navigable waters situated within the Northern District of California, or otherwise, or elsewhere, or at all.

XI.

And by way of further and special answer and defense to the said complainant's bill of complaint, the said respondent alleges that heretofore on, to-wit, the 25th day of June, A. D. 1888, the said complainant duly filed in the United States Circuit Court in and for the Northern District of California, its bill of complaint in equity, the same being so filed in case No. 7865, against said respondent,

the said last-mentioned bill of complaint containing all of the averments and allegations contained in the complainant's bill of complaint in this action, except the allegations with regard to the act of Congress entitled, "An act to create the California Debris Commission and regulate hydraulic mining in the State of California," and also the appointment of the members of said commission, and also the allegations that the said respondent had not filed with said commission its petition or deed or other written instrument, for that, at the time that said former bill of complaint was so filed, said act of Congress entitled, "An act to create the California Debris Commission and regulate hydraulic mining in the State of California," did not exist, nor did the said California Debris Commission exist, nor was there then in existence any act of similar terms or nature, or any board or officer with similar powers or authorities. That hereafter and on, to-wit, the first day of July, A. D. 1889, the said respondent filed its answer to said former bill of complaint, alleging the construction and maintenance of the aforesaid impounding works, and that thereby the mining debris from its said mines, mining grounds, and works were duly and sufficiently, and permanently impounded and restrained, as hereinbefore alleged, and that thereby the said navigable waters were prevented from being injured, or threatened with injury, from the mining debris from said respondent's said mines, mining grounds, and mining works. That thereafter evidence was duly introduced, and a trial was duly had upon the issues framed in said cause, and thereupon and thereafter it was duly and judicially determined by

said Court in said cause that the respondent's said mining by the hydraulic process of its said mines, mining grounds, and works did not injure, or threaten to injure, the navigable streams or any of the navigable waters of the State of California, or any of the lands adjacent thereto, and that the said respondent could so continue its hydraulic mining operations by the use of its said impounding works, without injuring, or threatening to injure, any of the navigable streams or waters of the State of California, and without injuring, or threatening to injure, the navigability of any of the navigable streams or navigable waters of the State of California, and that ever since said time the said respondent has maintained its said impounding works, and its hydraulic mining operations have been conducted in the same manner and in no other manner, and by the use of said impounding works in the said manner and in no other manner than that which it was in said action adjudicated that said respondent might do, without injuring, or threatening to injure, the navigable streams or navigable waters of the State of California, and without injuring, or threatening to injure, the navigability of said streams or navigable waters of the State of California, or either or any of them, and that the mining lands described or referred to in the bill of complaint in this action and in the bill of complaint in the former said action are the same.

And this respondent denies all and every and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is

any other matter, cause, or thing in the said complainant's said bill of complaint contained, material or necessary for this respondent to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of this respondent, all which matters and things this respondent is ready and willing to aver, maintain, and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

C. W. CROSS,
Solicitor for Respondent.

NORTH BLOOMFIELD GRAVEL MINING CO.

[Seal of North Bloomfield Gravel Mg. Co.]

By H. PICHOIR, Its Secretary.

United States of America,
Northern District of the State of California. } ss.

The answer of the respondent, the North Bloomfield Gravel Mining Company, was taken this 10th day of April, in the year 1896, before me under the common seal of the said corporation, as by their said seal affixed appears.

E. H. HEACOCK,
Commissioner U. S. Circuit Court, Northern District of California.

Due service of the within answer, and receipt of a true copy thereof, is hereby admitted this 13 (thirteenth) day of April, 1896.

H. S. FOOTE,
U. S. Attorney for Complainant.

[Endorsed]: Answer to complainant's bill. Filed April 13, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Dep. Clk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation),
Respondent.
No. 12,086.

Demurrer to Answer.

The demurrer of the complainant in the above-entitled cause, the United States of America, to the answer of the North Bloomfield Gravel Mining Company, a corporation, respondent herein.

The complainant herein, the United States of America, by protestation, not confessing or acknowledging any or all of the matters and things in the said respondent's answer to be true, in such manner and form as the same are therein set forth and alleged, save and except those matters and things which are set out in said complainant's amended bill of complaint herein, and are in said answer expressly admitted to be true, doth demur thereto, and for cause of demurrer showeth that the said respondent hath

not, in and by its said answer, made or stated any case or defense to the equity and cause of action set forth in the amended bill of complaint herein, as doth or ought to entitle it to the judgment prayed for in said answer to be hence dismissed with its costs, or at all.

Wherefore, and for divers other good reasons and causes of demurrer appearing in said answer, the said complainant, the United States of America, doth demur thereto, and humbly demands the judgment of the Court and the relief prayed for, in and in accordance with, the said amended bill of complaint herein.

H. S. FOOTE,
United States Attorney.
SAMUEL KNIGHT,
Assistant United States Attorney,
Solicitors for Complainant.

State and Northern District of California }
City and County of San Francisco. } ss.

Samuel Knight, being first duly sworn, deposes and says that he is one of the solicitors for the complainant herein, the United States of America; that the foregoing demurrer is not interposed for purposes of delay.

SAMUEL KNIGHT.

Subscribed and sworn to before me this 23d day of April, 1896.

W. B. BEAIZLEY,
Commissioner U. S. Circuit Court, Northern District of California.

Certificate.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

H. S. FOOTE,
U. S. Attorney.

SAMUEL KNIGHT,
Assistant U. S. Attorney,
Solicitors for Complainant.

Service of the within demurrer by copy admitted this 23d day of April, 1896.

C. W. CROSS,
Solicitor for Respondent.

[Endorsed]: Filed April 23, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY.

THE UNITED STATES,
Complainant,

vs.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation),
Respondent.

Exceptions to Answer.

Exceptions taken by complainant above named to the answer of the said defendant, the North Bloomfield Gravel Mining Company, a corporation, to the said complainant's bill of complaint herein.

The said complainant excepts to the said answer for that the said defendant hath not, in and by said answer, set forth facts and allegations sufficient to constitute a defense to the cause of action stated in said bill of complaint, in that said defendant admits that it "has at all times failed, neglected, and refused, and still does utterly fail, neglect, or refuse to file with said California Debris Commission a verified or any petition, setting forth such facts as will comply with the said act and the rules prescribed by said commission, or at all, either as prescribed in section nine of said act, or any other section thereof, and further admits that it has not, nor has any one in its

behalf, executed or acknowledged any deed or other instrument, whereby the said respondent surrendered or surrenders to said United States the right or privilege to regulate by law the manner or method in which the debris or a portion thereof, or any portion thereof, resulting from the working or operating of said works, gold mines, or mining grounds, by said process, shall be restrained, or what amount shall be produced therefrom."

It further alleges: "That it is not bound to file such or any petition with said California Debris Commission or such or any deed or written instrument, acknowledged or otherwise, or at all, with said California Debris Commission."

Therefore, the answer of said defendant is, as said complainant is advised, imperfect and insufficient, and said complainant excepts thereto, and prays that same may be stricken from the files of the court; and that the Court proceed to give its judgment and decree in favor of said complainant, as prayed in its bill of complaint herein.

H. S. FOOTE,
U. S. Atty.
SAMUEL KNIGHT,
Asst. U. S. Attorney,
Solicitors for Complainant.

Service of the within by copy admitted this 27th day of July, 1896.

C. W. CROSS,
Attorney for Deft.

[Endorsed]: Filed July 27th, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation),
Defendant.

Motion to Strike Answer from Files.

Now comes the complainant above named and moves the Court to strike from its files the answer of the defendant herein to the complainant's amended bill of complaint, on the ground that the said answer does not, nor does any part thereof, state facts sufficient, and is insufficient, to constitute a defense to said bill of complaint.

This motion will be made on the files herein.

25 July, 1896.

H. S. FOOTE,
U. S. Atty.
SAMUEL KNIGHT,
Asst. U. S. Atty.,
Solicitors for Complainant.

Service of the within by copy admitted this 27th day of July, 1896.

C. W. CROSS,
Attorney for Deft.

[Endorsed]: Filed July 27th, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
NORTH BLOOMFIELD GRAVEL MINING COMPANY,
Respondent.
} No. 12,086.

Enrollment.

The complainant filed its bill of complaint herein on the 19th day of June, 1895, which is hereto annexed.

A subpoena to appear and answer in said cause was thereupon issued, returnable on the fifth day of August, A. D. 1895, which is hereto annexed.

The respondents appeared herein on the 8th day of July, 1895, by Cross, Ford, Kelly & Abbott, Esqs., their solicitors.

On the 3d day of August, 1895, a demurrer of defendant North Bloomfield Gravel Mining Company was filed herein, which is hereto annexed.

On the 3d day of August, 1895, a motion of defendant Meyer to strike out, etc., was filed herein, and is hereto annexed.

On the 7th day of August, 1895, a demurrer of defendant Meyer was filed herein, and is hereto annexed.

On the 16th day of December, 1895, an order granting defendant Meyer's motion to dismiss was made and entered herein, a copy of which is hereto annexed.

On the 9th of January, 1896, a demurrer of the defendant North Bloomfield Gravel Mining Co. was filed herein, and is hereto annexed.

On the 9th of March, 1896, an order overruling said demurrer was made and entered herein, a copy of which is hereto annexed.

On the 13th day of April, 1896, the defendant filed an answer herein, which is hereto annexed.

On the 27th day of July, 1896, the complainant filed a demurrer to said answer, exceptions to said answer, and motion to strike out said answer, which are hereto annexed.

Said cause was submitted upon bill and answer, and thereafter a final decree was duly signed, filed, and entered herein, in the words and figures following, to-wit:

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY.

THE UNITED STATES,
Complainant,

vs.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation),
Respondent.

No. 12,086.

Decree.

This cause came regularly on for hearing before the Court upon the 25th day of January, 1897, upon bill and answer, Messrs. Samuel Knight, Assistant U. S. Attorney, and Robert T. Devlin, as amicus curiae, appearing as solicitors on behalf of complainant, and Messrs. C. W. Cross and Chas. A. Garter appearing as solicitors on behalf of respondent, and the said matter having been thereupon submitted to the Court for determination and decision, and the Court having been fully advised in the premises, and after due consideration thereof, it is by the Court ordered, adjudged, and decreed:

That an injunction issue out of and under the seal of this Court directed to respondent, as prayed for in said

bill, perpetually enjoining and restraining it, its officers, agents, grantees, lessees, or employees, from continuing to operate, and from operating or suffering or allowing to be operated, by the hydraulic process or method of mining, as the same is and has been known, conducted, practiced, or understood in the State of California (as set forth in paragraph V of said bill), its works, mines, or mining grounds, situate, lying, and being adjacent to, on, or near Humbug creek, a tributary of the Yuba river, until said respondent shall properly make, present, and file with the California Debris Commission, appointed and acting under an act of Congress entitled, "An Act to create the California Debris Commission and regulate hydraulic mining in the State of California," approved March 1, 1893, its duly verified petition setting forth such facts as will comply with said act or any act hereafter amendatory thereof and then in force, and the rules prescribed or to hereafter at such time prescribed by said California Debris Commission; and until said respondent shall duly execute, acknowledge, and deliver to said commission the deed or instrument provided for in said act or any act hereafter amendatory thereof and then in force whereby said respondent surrenders to the United States the right and privilege to regulate by law, as provided in said act or by any law that may be hereafter enacted, or by such rules and regulations as are or may be prescribed by virtue thereof, the manner and method in which the debris resulting from the working and operation by the said hydraulic process of said works, mines, or mining

grounds or claims shall be retained, and what amount shall be produced therefrom; and further, that complainant have and recover of said respondent its costs herein, taxed at the sum of $42.30.

Dated June 10, 1897.

ROSS,
Circuit Judge.

[Endorsed]: Filed and entered June 10, 1897. W. J. Costigan, Clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES,
Complainant,
vs.
THE NORTH BLOOMFIELD GRAVEL MINING CO.,
Respondent.

Memorandum of Costs and Disbursements.

Disbursements:

Marshal's fees	$ 4.00
Clerk's fees	18.30
Docket fee	20.00
Total	$42.30

Taxed at $42.30.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

Samuel Knight, being duly sworn ,deposes and says that he is Asst. U. S. Attorney, and one of the attorneys for the complainant in the above-entitled cause, and as such

is better informed relative to the above costs and disbursements than the said complainant; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

SAMUEL KNIGHT.

Subscribed and sworn to before me this 14th day of June, A. D. 1897.

W. B. BEAIZLEY,

Commissioner of the U. S. Circuit Court, Northern District of California.

To C. W. Cross and Chas. A. Garter, Attorneys for Respondents, San Francisco, Cal.

You will please take notice that on Wednesday, the sixteenth day of June, A. D. 1897, at the hour of 10 o'clock A. M., I will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

H. S. FOOTE,

Attorney for Complainant.

Service of within memorandum of costs and disbursements, and receipt of a copy thereof, acknowledged this 14th day of June, A. D. 1897.

C. W. CROSS,

Attorney for Respondent.

[Endorsed]: Memorandum of costs and disbursements. Filed this 15th day of June, A. D. 1897. W. J. Costigan, Clerk.

Certificate to Enrollment.

Whereupon, said pleadings, subpoena, copies of orders, decree, and a memorandum of taxed costs are hereto annexed, said final decree being duly signed, filed, and enrolled, pursuant to the practice of said Circuit Court.

Attest, etc. W. J. COSTIGAN,
[Seal] Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Enrolled papers. Filed June 10th, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

THE UNITED STATES,
Complainant,
vs.
THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation),
Respondent.

Opinion.

This case was submitted upon bill and answer. It involves the construction of the act of Congress entitled "An Act to create the California Debris Commission and

regulate hydraulic mining in the State of California," approved March 1, 1893. (Statutes of 1891-1893, p. 507.) The bill alleges the appointment and qualification of the commissioners provided for by that act, and the entry upon its duties by the commission. It alleges that the defendant company is, and was at the times mentioned in the bill, the owner and in possession of certain mining ground situated on or near the Yuba river and its tributaries, within the territory drained by the Sacramento and San Joaquin rivers, and is, and was during the times mentioned, engaged in working its mining ground by the hydraulic process; that the waters of the Sacramento river flow into Suisun bay, and thence through the Straits of Carquinez into San Pablo bay, and thence through the Golden Gate into the Pacific Ocean; that Feather river flows into the Sacramento, and that Yuba river flows into the Feather; that all of these rivers were, at the time of the cession of the territory of Upper California to the United States by the Republic of Mexico, to-wit, February 2, 1848, and ever since have been, and now are, public navigable rivers, and free highways for the uses and purposes of commerce and navigation, and during all of the time mentioned were, and still are, navigable and navigated by steamboats and other vessels, drawing from eight to sixteen feet of water, and engaged in commerce and navigation within the State of California; that the Sacramento river during all of the time mentioned was, and still is, so navigable and navigated by steamboats and other vessels from its mouth to the mouth of Middle creek, in Shasta county, above the point of confluence of the Sac-

ramento and Feather rivers; that the Feather river during the same time was, and still is, so navigable from its mouth to the mouth of the Yuba river, and that the Yuba river during the same time was, and still is, navigable from its mouth to a point about one mile above its mouth; that all of the rivers mentioned have their principal sources in the western slope of the Sierra Nevada Mountains which lie to the east and northeast of the Sacramento valley, through which the Sacramento river flows, and in a small part in the eastern slope of the Coast Range Mountains, which lie to the west of the Sacramento valley; that all of the waters of the western slope of the Sierra Nevada Mountains which lies opposite the Sacramento valley are tributary to the rivers mentioned, and that they have their sources in lakes, springs, small streams, and canyons, which receive their waters from the rain and snow which fall each year to a great depth upon the mountains; that the defendant company, in working its mining ground, so dumps and discharges the debris therefrom as that the same, or a portion thereof, is ultimately carried and flows into the Yuba river and its forks, and with the debris from other mining works operated by the same process is thence so carried and flows into the Feather, Sacramento, and other streams forming a part of and tributary to the Sacramento river system, and thence into the other waters, bays and straits already mentioned; that hydraulic mining as now, and for more than twenty years last past, practiced and understood in the State of California, is a process of gold mining by which hills, ridges, banks, and

other forms of deposits of earth which contain gold are mined and removed from their position by means of large streams of water, which by great pressure are forced through pipes terminating in nozzles, known as monitors or little giants; that the water is discharged from such nozzles with great force, by a water pressure of from 50 to 400 feet per second, against and upon the hills, ridges, banks, and other deposits, which are usually shattered or broken up by means of blasts of powder, and softened by running water over and along such shattered or broken banks of earth, and undermined by streams of water flowing at the foot of such banks, thus caving down and washing off portions thereof before water is discharged from the nozzles against them; that the clay, sand, gravel, stones, rocks, and boulders of which such gold mines are composed, known as mining debris, together with the gold contained therein, are carried and moved by the streams of water into and through flumes, sluices, and other conduits at or adjacent to the respective mining claims—the gold being arrested therein, and the debris being carried by the water through the flumes, sluices, and conduits, and dumped or discharged into impounding basins or reservoirs, and that a part of such debris is thence carried and flows into the adjacent streams or canyons; that the larger and heavier portions of the debris are deposited in such impounding basins or reservoirs, and the smaller and lighter portions, being not less than 50 per cent thereof, are carried down the streams and lodged in the rivers and other channels and upon the lands adjacent thereto; that a portion of such mining de-

bris, ever since the commencement of hydraulic mining within the State, has, during a large part of each year, been deposited and lodged, and is still being deposited and lodged, in the beds and channels of the rivers mentioned, and will continue to be so deposited and lodged while such hydraulic mining continues. The bill next alleges that the defendant company has failed and neglected and refused to file with the California Debris Commission a verified, or any, petition, setting forth such facts as will comply with the act of Congress upon the subject and with the rules prescribed by the Commission, and has not, nor has any one on its behalf, executed and acknowledged the conveyance mentioned in that act, and, notwithstanding such neglect and failure, that the defendant company has continued to mine, and is now engaged in mining, its mining ground by the hydraulic process. The prayer of the bill is for a writ of injunction perpetually enjoining the defendant, its agents, grantees, lessees, and employees, from operating, or allowing to be operated by the hydraulic process, its mining ground, until it shall make, present, and file with the Debris Commission the petition set forth in the aforesaid act of Congress, accompanied by the conveyance therein mentioned, and otherwise conform to the rules and regulations prescribed by the commission by virtue of that statute.

The answer of the defendant company admits the appointment of the commissioners and their qualification and organization as alleged, and its failure to file with the commission the petition and conveyance mentioned in the act, and the fact of its mining its ground by the hy-

draulic process notwithstanding. It alleges that its mines and works are all situated adjacent to Humbug creek, a small tributary of one of the main branches of the Yuba river, and within the territory drained by the Sacramento river system. It admits the fact of the navigability of the Sacramento, Feather, and Yuba rivers, but denies the extent of the navigability alleged in the bill. It admits the sources of the rivers as alleged. It denies that it so dumps and discharges the debris from its mines and works, or any thereof, in such manner that the same, or any material portion of it, is ultimately carried or flows into the Yuba, Feather, or Sacramento rivers, or other streams forming a part of or tributary thereto, or upon the lands adjacent thereto, but avers that only a trifling quantity of the debris from the defendant's mining ground escapes from or passes beyond the impounding works and reservoirs of the defendant company, and that the same consists solely of light, flocculent matter of about the same specific gravity as water, and so finely communicated as to readily float in and be moved by the slightest movement of the water in which it is suspended, and that all of the matter so escaping from or passing beyond the defendant's impounding works is carried in suspension in the streams of water until it reaches the Suisun bay, and that from the head of Suisun bay, by the tidal currents and movements of the water of that bay, of the Carquinez Straits, San Pablo bay, and the bay of San Francisco, and the tidal currents passing in and out of the Golden Gate, it is all carried and swept into the ocean at distances remote from the land or navigable

streams of the State of California, and does not deposit in any place where it either injures, or threatens to injure, any navigable waters within the jurisdiction of the United States. The answer further denies that any portion of the debris from the defendant's mines or mining works at any time since the passage of the act of Congress in question, has been deposited or lodged in the beds or channels of either of the rivers named, and denies that any of such debris will be so deposited or lodged while it continues the mining of its ground by the hydraulic process. The answer further avers that about the years 1887 and 1888 the defendant erected upon its mining ground, which had been conveyed to it for placer mining purposes by the government of the United States, extensive, complete, and expensive impounding works, which have ever since been so maintained as to successfully, completely, and permanently impound all of the mining debris resulting from its mining operations, upon its mining ground, except such light and inconsiderable portion of the debris therefrom as will not settle in water when affected by the least motion, nor when such water is at rest, unless the same be maintained in a condition of rest for a long period of time, and that such light and flocculent matter, when it passes from the defendant's impounding works, flows into Humbug creek, which creek flows with a rapid current into the South Yuba river, and that the South Yuba river flows with a rapid current into the main Yuba river, and that the main Yuba river flows with a rapid current into the Feather river, and that the

Feather river flows with a rapid current into the Sacramento river; that the Sacramento river, with a moderate current, flows into Suisun bay, and that from the head of Suisun bay to the waters remote from the Golden Gate the waters are constantly agitated and rapidly moved by tidal currents, and that the light and flocculent matter which so escapes from the defendant's impounding works is carried by the currents of the streams mentioned, and by the tidal currents in the other navigable waters named, out of the Golden Gate and to localities remote from the shores of the Pacific Ocean, and that no part thereof does injure or threatens to injure, either by itself, or in connection with debris from other mines, any of the navigable waters mentioned in the bill, or any other waters. The answer further alleges that on the 25th day of June, 1888, the United States filed in this court its bill in equity against this defendant, containing all of the averments of the present bill, except the allegations with regard to the act of Congress of March 1, 1893 (which was not then in existence), and the appointment of the members of the commission thereby created, and the allegations with respect to the failure of the defendant to file with the commission the petition and conveyance required by that act; that thereafter, and on July 1, 1889, the defendant filed its answer to that bill of complaint, alleging the construction and maintenance of the aforesaid impounding works, and that thereby the debris from its mining ground was sufficiently and permanently impounded and restrained, as is alleged in the present answer, and that

thereby the navigable waters mentioned were prevented from being injured or threatened with injury from the debris from the defendant's mines; that thereafter a trial was duly had upon the issues framed in the cause, upon which trial it was duly adjudged that the defendant's mining by the hydraulic process did not injure, or threaten to injure, the navigable streams or any of the navigable waters of the State of California, or any of the lands adjacent thereto, and that the defendant could continue its hydraulic mining operations by the use of its said impounding works without injuring, or threatening to injure, any of the navigable waters of the State of California and without injuring, or threatening to injure, the navigability of any of the navigable streams of the State, and that ever since that time the defendant has maintained its said impounding works, and its hydraulic mining operations have ever since been conducted in the same manner (and in no other manner), that it was in that action adjudicated they might be without injury to any waters or lands; that the mining ground and works described in the bill in the present suit and in the bill in the former suit are the same.

As the case is submitted on bill and answer, such of the averments of the latter as are inconsistent with the allegations of the bill, as well as the affirmative matter set up in defense of the suit, must be taken as true.

It is thus made to appear that none of the debris from the mining ground or works of the defendant company is lodged or deposited in any of the navigable waters men-

tioned in the bill, or upon any land adjacent thereto; but, on the contrary, that such light, flocculent matter as escapes from the mines and impounding works of the defendant company is carried in suspension by the moving streams and waters into the Pacific Ocean, beyond the jurisdiction of the United States.

If, however, Congress has, in the exercise of its power to declare what may or may not constitute obstructions thereto, by its act, prohibited the putting into the said navigable waters any such light, flocculent matter, there can be no doubt, I think, of the power of a court of equity to prevent, by writ of injunction, the unlawful act. (In re Debs, 158 U. S. 565, 599, 600.)

The absolute power and control of Congress over the navigable waters of the United States, in the interest of commerce with foreign nations and among the several States, and its right to declare what may or may not constitute obstructions thereto, is thoroughly settled. (Miller v. Mayor, etc., 109 U. S. 385; Cardwell v. American River Bridge Co., 113 U. S. 205; Escanaber Co. v. Chicago, 107 U. S. 678; South Carolina v. Georgia, 93 U. S. 4; Gilman v. Philadelphia, 3 Wall. 713.)

Subject to this power on the part of Congress, all of the navigable waters within the State of California are common highways. The State was admitted into the Union upon the condition, among other conditions, "that all of the navigable waters within the said State shall be common highways and forever free, as well to the inhabitants of said State as to the citizens of the United States, with-

out any tax, duty, or impost therefor." (9 U. S. Stats. at Large, 452-3.)

The important question in the case is, What has Congress enacted in respect to the navigable waters mentioned in the bill, in connection with mining by the hydraulic process? There is but one act upon the subject, and that is the one the construction of which is here involved. To properly construe it, the conditions giving rise to its enactment must be considered. Long-continued mining by this process, in the territory drained by the rivers mentioned, had resulted in depositing in them and upon much of the adjacent land vast quantities of debris, thereby, to a great extent, impeding the navigation of the waters, and rendering valueless large quantities of otherwise fertile lands. This unfortunate condition of affairs necessarily gave rise to many and bitter contests in the courts between the conflicting interests. Some of the suits were brought in this court, and many of them in the courts of the State, resulting, ultimately, wherever it was shown that such hydraulic mining was causing injury to the public streams or waters, or to other's lands, in perpetually enjoining such mining. One of such suits was brought against the present defendant, in this court, to enjoin it from working by the hydraulic process the same mining ground it is now operating. That suit resulted in a decree enjoining the defendant from so working its mining ground; but the decree contained a provision to the effect that if, in the future, the defendant corporation should show to the Court that it had con-

structed impounding reservoirs which would successfully impound its mining debris, the decree might be modified so as to permit the operation of the mine. That case was tried and decided by Judge Sawyer, and is reported in 18 Fed. Rep. 753, under the title of Woodruff v. Mining Co. Sometime after the making of the decree, the defendant established a system of impounding works, and commenced again its mining operations. That action on the part of the defendant resulted in a suit brought in this court by the United States, against the defendant, to obtain an injunction prohibiting it from continuing its hydraulic mining operations. After a trial of that case, in which much testimony was introduced, this Court (Judge Gilbert presiding) found that by the construction and use of its impounding works, the defendant prevented the escape of any debris from its mine into the navigable waters of the rivers mentioned that would tend to impair or injure their navigability, and therefore denied the injunction prayed for.

In neither of these decisions was mining by the hydraulic process regarded, in and of itself, as unlawful. That it is not unlawful, but highly useful and commendable ,when properly conducted and without injury to the property or rights of others, hardly needs judicial decision. In County of Yuba v. Cloke, 70 Cal. 239, 243, the Supreme Court of California said: "It seems to us it must be conceded that the business of hydraulic mining is not within itself unlawful or necessarily injurious to others. The unlawful nature of the business results from the man-

ner in which it is carried on, and the neglect of parties engaged therein to properly care for the debris resulting therefrom, whereby it is allowed to follow the stream and eventually cause injury to property situated below."

Nobody wanted gold mining by the hydraulic process stopped, so long as it could be prosecuted without injury to the navigable waters or to the property or rights of others. And so an effort was made by the parties most directly interested—the miners and agriculturists—to induce Congress to legislate upon the subject; which effort resulted in the passage of the act of March 1, 1893. As enacted, after creating the California Debris Commission and providing for the appointment of its members, and for the filling of vacancies occurring therein, and for the exercise of the powers conferred upon it, under the direction of the Secretary of War, and the supervision of the chief of engineers, and authorizing commission to adopt rules and regulations, not inconsistent with law, to govern its deliberations and procedure, the act declared the jurisdiction of the commission, in so far as the same affects mining carried on by the hydraulic process, to extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the State of California. It declared, for the purposes of the act, "hydraulic mining" and "mining by the hydraulic process" to have the meaning and application given to those terms in the State of California.

That meaning is sufficiently set out in the bill in the present case.

The act prohibited and declared unlawful such hydraulic mining "directly or indirectly injuring the navigability of said river systems, carried on in said territory, other than as permitted under" its provisions. (Sections 3 and 22.) But this was by no means the extent of the act or of its prohibition. Its very purpose was to provide a means by which such mining could be carried on in the territory named, without injuring the navigability of the said river systems, directly or indirectly. Recognizing the great damage that had been done to the navigable waters mentioned by hydraulic mining in the past, it created a commission of skilled officers, to exercise the powers conferred upon it, under the direction of the Secretary of War and the supervision of the Chief of Engineers of the Army, and, by section 4 of the act, made it the duty of the commission to mature and adopt, from examinations and surveys already made, and from such additional examinations and surveys as the commission should deem necessary, such plan or plans "as will improve the navigability of all the rivers comprising said systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from debris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, the navigability of said rivers to the condition existing in eighteen hundred and sixty, and permitting mining by the hydraulic process, as the term

is understood in said State, to be carried on, provided the same can be accomplished without injury to the navigability of said rivers or the lands adjacent thereto." By section 5 of the act, it is made the duty of the commission to "further examine, survey, and determine the utility and practicability, for the purposes hereinafter indicated, of storage sites in the tributaries of said rivers and in the respective branches of said tributaries, or in the plains, basins, sloughs, and tule and swamp lands adjacent to or along the course of said rivers, for the storage of debris or water, or as settling reservoirs, with the object of using the same by either or all of these methods to aid in the improvement and protection of said navigable rivers, by preventing deposits therein of debris resulting from mining operations, natural erosion, or other causes, or for affording relief thereto in flood times, and providing sufficient water to maintain scouring force therein in the summer season; and, in connection therewith, to investigate such hydraulic and other mines as are now or may have been worked by methods intended to restrain the debris and material moved in operating such mines by impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as science, experience, and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid."

Sections 9 and 10 of the act are as follows:

"Sec 9. That the individual proprietor or proprietors,

or, in case of a corporation, its manager or agent appointed for that purpose, owning mining ground in the territory in the State of California mentioned in section three hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition, setting forth such facts as will comply with law and the rules prescribed by said commission."

"Sec. 10. That said petition shall be accompanied by an instrument duly executed and acknowledged as required by the law of the said State, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the debris resulting from the working of said mine or mines shall be restrained and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said State; provided, that they shall not interfere with the navigability of the aforesaid rivers."

Subsequent sections provide for a joint petition by the owners of several mining claims so situated as to require a common dumping ground or restraining works, and for proceedings of the commission thereon, including the provision contained in section 14, that upon the completion of such work as may be authorized and required by

order of the commission, "if found in every respect to meet the requirements of the said order and said approved plans and specifications, permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of this act."

Section 15 is as follows:

"Sec. 15. That no permission granted to a mine owner or owners under this act shall take effect, so far as regards the working of a mine, until all impounding dams or other restraining works, if any are prescribed by the order granting such permission, have been completed, and until the impounding dams, or other restraining works, or settling reservoirs provided by said commission have reached such a stage as, in the opinion of said commission, it is safe to use the same; provided, however, that if said commission shall be of the opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said systems and the work of said commission, then the owner or owners of such mine or mines may be permitted to commence operations."

And by section 17 it is declared: "That at no time shall any more debris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers and the respective branches of each, worked under the provisions of this act, than can be impounded within the restraining works erected."

From these provisions (and there is nothing in the act

to the contrary) it seems quite clear to me that its real intent and meaning is, to prohibit and make unlawful any and all hydraulic mining in the territory drained by the Sacramento and San Joaquin river systems in the State of California, directly or indirectly injuring the navigability of said river systems, and to permit it in all cases where the work can be prosecuted without such injury to the navigability of the said river systems, or to the lands adjacent thereto. That in order to properly determine the facts upon which the legislative will is to act, a skilled commission is created, whose duty it is to ascertain and determine what will, or will not, cause the prohibited injury, and to prescribe the character of impounding works, and the extent to which hydraulic mining in the territory described may be carried on without causing such injury. To give effect to this manifest purpose, Congress, in effect, enacted that until the commission should find that such mining can be carried on without causing the prohibited injury, all hydraulic mining within the territory drained by the Sacramento and San Joaquin river systems is unlawful; for by section 9 it is in terms declared that any person or corporation owning mining ground in that territory, "which it is desired to work by the hydraulic process, must file with said commission a verified petition setting forth such facts as will comply with law and the rules prescribed by said commission," accompanied by the instrument described in the next section, that is to say: "An instrument duly executed and acknowledged as required by the law of the said State,

whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the debris resulting from the working of said mine or mines shall be restrained and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said State; provided, that they shall not interfere with the navigability of the aforesaid rivers." The plain meaning of the provision that any person or corporation owning mining ground within the territory drained by the rivers mentioned, which it is desired to work by hydraulic process, must file a certain described petition, is, that unless such petition be filed, such ground shall not be worked. Confirmation of this is found in the express declaration contained in section 17, " that at no time shall any more debris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers and the respective branches of each, worked under the provisions of this act, than can be impounded within the restraining works erected,"and in other clauses of the act already cited.

As has been already observed, the right of Congress to say what may or may not constitute an obstruction of the navigable waters between the States or connecting with

the ocean, is well settled. Light, flocculent matter escaping from one or more mines worked by the hydraulic process and carried into such waters may not tend to injure their navigability, but such matter, in connection with similar matter from a great many other mines, may do so. It was the right of Congress to put a stop to the working of all mines that contribute in any degree to such injury, and to prescribe the conditions upon which such work so contributing might be prosecuted. In some of the contests that were brought before the courts, prior to the passage of the act in question, it was held that any and all persons and corporations contributing to the injury should be enjoined. (Woodruff v. Mining Co., supra; People v. Gold Run D. & M. Co., 66 Cal. 138, and cases there cited.)

In the case of Miller v. Mayor of New York, 109 U. S. 385, Congress had passed an act (15 Stats. 336) authorizing the construction of a bridge over East river, between the cities of New York and Brooklyn, and declaring that when completed it should be "a lawful structure and post road for the conveyance of the mails of the United States; provided, that the said bridge shall be so constructed and built as not to obstruct, impair, or injuriously modify the navigation of the river; and in order to secure a compliance with these conditions, the company, previous to commencing the construction of the bridge, shall submit to the Secretary of War a plan of the bridge, with a detailed map of the river at the proposed site of the bridge and for the distance of a mile above and below the site, exhibit-

ing the depths and currents at all points of the same, together with all other information touching said bridge and river as may be deemed requisite by the Secretary of War to determine whether the said bridge, when built will conform to the prescribed conditions of the act, not to obstruct, impair, or injuriously modify the navigation of the river."

The second section of the act was as follows: "That the Secretary of War is hereby authorized and directed, upon receiving said plan and map and other information, and upon being satisfied that a bridge built on such plan, and at said locality, will conform to the prescribed conditions of this act, not to obstruct, impair, or injuriously modify the navigation of said river, to notify the said company that he approves the same, and upon receiving such notification the said company may proceed to the erection of said bridge, conforming strictly to the approved plan and location. But until the Secretary of War approve the plan and location of said bridge, and notify said company of the same in writing, the bridge shall not be built or commenced; and should any change be made in the plan of the bridge during the progress of the work thereon, such change shall be subject likewise to the approval of the Secretary of War."

It was contended by the plaintiff in the case, who sought to restrain the building of the bridge, that Congress could not leave it to the Secretary of War to determine whether the proposed construction would be an obstruction to the navigation of the river; but the Court

answered: "By submitting the matter to the secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the Secretary of War as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between States, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of the heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course,

come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate. (South Carolina v. Georgia, 93 U. S. 13)."

So here, Congress has created a commission, under the direction of the Secretary of War and the supervision of the Chief of Engineers of the Army, to ascertain and determine whether the various hydraulic mines within the territory drained by the Sacramento and San Joaquin river systems can be operated by means of impounding reservoirs and other works without injury to those navigable waters; and if so, the act of Congress permits them to be operated in such a prescribed way as will prevent any such injury. Until the matters of fact committed to the commission have been ascertained and the extent and methods of the work so prescribed, the act of Congress prohibits the operation of any mine by the hydraulic process within the territory drained by the Sacramento and San Joaquin river systems from which any debris matter flows into those waters. This, in my opinion, is the true construction of the act, and to it, as thus construed, I see no constitutional objection. It is too late now for anyone to question the power on the part of Congress to declare that debris of any character, or other thing, constitutes an obstruction to the navigable waters within its control, and to prohibit the use of such waters by any such debris or other thing. The power to absolutely prevent the use of such waters for the objectionable purposes, necessarily includes the power to prescribe the

terms and conditions upon which they may be so used. The provision of section 10 of the act, requiring the surrender to the United States of the right to regulate the manner in which the debris resulting from the working of such mine or mines shall be restrained, and what amount shall be produced therefrom, only constitutes one of the conditions to such use required by Congress. As Congress already had that power of regulation, it needed no conveyance from the mine owner to vest it. For this reason, the insertion of that requirement by Congress as a condition to the granting of a permit to mine by the hydraulic process, does not render the act obnoxious to any of the objections urged against it.

A decree will be entered for the complainant as prayed for. (Signed) ROSS,
Circuit Judge.

[Endorsed]: Opinion. Filed June 8, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY.

THE UNITED STATES,
Complainant,

vs.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation)
Respondent.

No. 12,086.

Petition for Order Allowing Appeal and Suspension of Injunction During Pendency of Appeal.

The respondent herein, the North Bloomfield Gravel Mining Company, feeling itself aggrieved by the order made by said court in said cause, sustaining the complainant's demurrer to the respondent's answer to the bill of complaint, and the decretal order thereupon made, decreeing that a perpetual injunction issue against the said respondent, and by the final decree rendered and entered in said cause, now comes by C. W. Cross, Esq., its solicitor, and petitions the said Court for an order allowing said respondent to prosecute an appeal from said orders and decree, to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to

the laws of Congress and the statutes of the United States in such case made and provided, and also that an order be made, fixing the amount of security which respondent shall give and furnish upon such appeal. And the respondent further humbly petitions that an order be made, suspending the injunction by the final decree in said cause, during the pendency of the said appeal, such suspension to be granted upon such terms, as to bond or otherwise, as may be considered proper by the Honorable Justice of said court, who decided said cause. And your petitioner will ever pray, etc.

C. W. CROSS,

Solicitor for the said Respondent, The North Bloomfield Gravel Mining Co.

[Endorsed]: Filed June 22, 1897. W. J. Costigan, Clerk. W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY.

THE UNITED STATES,
Complainant,
vs.
THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation),
Respondent.
No. 12,086.

Assignment of Errors.

The respondent in the above-entitled action hereby assigns the following errors:

1. The Court erred in sustaining the demurrer to the respondent's answer to the bill of complaint in said cause, to which order the respondent duly excepts, and the making of said order by said Court is hereby assigned as error.

2. The Court erred in ordering that a judgment and decree be entered in favor of the said complainant and against the said respondent, upon the pleadings in said cause, and without a trial of the issues thereby made, and the said order of the Court is hereby assigned as error.

3. The Court erred in rendering and entering a judgment and decree in favor of said complainant and against

the said respondent in said cause, and the same is hereby assigned as error.

C. W. CROSS,
Solicitor for the said Respondent.

[Endorsed]: Filed June 22, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term ,to-wit, the March term, A. D. 1897, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Tuesday, the 22d day of June, in the year of our Lord, one thousand eight hundred and ninety-seven.

Present: Honorable ERSKINE M. ROSS, Circuit Judge.

THE UNITED STATES OF AMERICA,
vs.
NORTH BLOOMFIELD GRAVEL MINING COMPANY.
No. 12,086.

Order Allowing Appeal and Suspending Injunction.

Upon motion of C. W. Cross, Esq., counsel for respondent, and upon the filing of a petition for an order allowing

an appeal, together with an assignment of errors herein, it is ordered that an appeal from the final decree filed and entered June 10, 1897, herein be, and hereby is, allowed to the United States Circuit Court of Appeals for the Ninth Circuit; that the amount of the bond on said appeal to be given by respondent be, and hereby is, fixed at the sum of $500, and that a certified transcript of the record and all proceedings herein be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

Counsel for respondent then moved the Court that, under the provisions of rule 93 of the rules of practice prescribed for the courts of equity of the United States, the injunction awarded complainant in the final decree herein be suspended pending the appeal allowed herein. After hearing argument of said counsel, and of H. S. Foote, Esq., U. S. Attorney, opposing the motion on behalf of complainant, it was ordered, pursuant to the provisions of said Equity Rule 93, that said motion be, and hereby is, granted, and that the injunction awarded the complainant in the final decree herein be, and hereby is, suspended pending the determination of the appeal hereinabove allowed, or until the further order of the Court.

IN EQUITY.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

THE UNITED STATES,
Complainant,
vs.
THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (a Corporation),
Respondent.
No. 12,086.

Bond on Appeal.

Know All Men by These Presents, that we, the North Bloomfield Gravel Mining Company, a corporation, organized under the laws of the State of California, and having its principal place of business in the city and county of San Francisco, State of California, as principal, and A. Boral and H. Pichoir, as sureties, are held and firmly bound unto the United States of America in the full and just sum of five hundred dollars, to be paid to said the United States of America, or its attorneys, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 22d day of June, in the year of our Lord, one thousand eight hundred and ninety-seven.

Whereas, lately, at a session of the Circuit Court of the United States, for the Northern District of California, in a suit pending in said court, between the said the United States, complainant, and said the North Bloomfield Gravel Mining Company (a corporation), respondent, a decree was rendered against the said the North Bloomfield Gravel Mining Company, and the said the North Bloomfield Gravel Mining Company having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals, to reverse the decree in the aforesaid suit, and a citation directed to the said the United States of America is about to be issued, citing and admonishing the said the United States of America to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California—

Now, the condition of the above obligation is such, that if the said the North Bloomfield Gravel Mining Company shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its answer in said action good, then the above obligation is to be void; otherwise to remain in full force and virtue.

NORTH BLOOMFIELD GRAVEL MINING COMPANY.

[Corporate Seal of North Bloomfield Gravel Mining Company.]

By H. PICHOIR,
Secretary.

ANT. BOREL. [Seal]

H. PICHOIR. [Seal]

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

A. Borel and H. Pichoir, being duly sworn, each for himself, and not one for the other, deposes and says that he is a resident and householder in said Northern District of California, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all his debts and liabilities.

ANT. BOREL.
H. PICHOIR.

Subscribed and sworn to before me this 22d day of June, A. D. 1897.

W. J. COSTIGAN,
Commissioner and Clerk U. S. Circuit Court, Northern District of California.

The sufficiency of the sureties on the foregoing bond approved this 23d day of June, A. D. 1897.

ROSS,
Circuit Judge.

[Endorsed]: Filed June 23, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States for the Ninth Judicial Circuit, Northern District of California.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
NORTH BLOOMFIELD GRAVEL MINING COMPANY,
Respondent.
No. 12,086.

Clerk's Certificate to Transcript.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing pages, numbered from 1 to 71, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $42.00, and that said amount was paid by North Bloomfield Gravel Mining Company, respondent and appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 15th day of October, A. D. 1897.

[Seal] SOUTHARD HOFFMAN,

Clerk United States Circuit Court, Northern District of California.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 22d day of October next, pursuant to an order allowing an appeal in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California in a certain action numbered 12,086, in Equity, wherein the North Bloomfield Gravel Mining Company, a corporation, organized under the laws of the State of California, and having its principal place of business in the city and county of San Francisco, State of California, is respondent and plaintiff in error, and you are complainant and appellee, to show cause, if any there be, why the final decree rendered against the said appellant, as in the said order allowing

an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this 24 day of September, A. D. 1897.

WM. W. MORROW,
Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this 14th day of October, 1897.

SAMUEL KNIGHT,
Asst. U. S. Attorney for Appellee.

[Endorsed]: Citation. Filed October 14th, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

[Endorsed]: No. 405. United States Circuit Court of Appeals for the Ninth Circuit. The North Bloomfield Gravel Mining Company, a Corporation, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon appeal from the United States Circuit Court of the Ninth Judicial Circuit, in and for the Northern District of California.

Filed Oct. 21, 1897.

F. D. MONCKTON,
Clerk.

No. 405.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY, (A Corporation,)
Appellant,

ads.

THE UNITED STATES OF AMERICA,
Appellee.

Appellant's Brief.

C. W. CROSS,
Solicitor for Appellant.

Filed..... .....*1898.*

.....*Clerk.*

By..... *Deputy.*

In the United States Circuit Court of Appeals, for the Ninth Circuit, upon Appeal from the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY (A CORPORATION),
Appellant,
ads.
THE UNITED STATES OF AMERICA,
Appellee.

Appellant's Brief.

In this case the question involved is, whether or not a hydraulic mine situated upon the water-shed of the Sacramento River, and remote from its navigable streams, and carrying on its operations in such a way as to do no injury to the navigable streams, or to the lands adjacent thereto, can be properly enjoined at suit of the United States, merely because the owners of such hydraulic mine have not obtained from the California Debris Commission a permit to mine by the hydraulic process.

The legislation upon which the United States relies is an Act of Congress, commonly known as the "Caminetti

Act," and contained in the 27th U. S. Statutes at Large, pages 507–511.

The question upon appeal arises solely upon the pleadings and judgment; a judgment and decree, enjoining the appellant from mining by the hydraulic process, having been rendered and entered upon an order sustaining a demurrer to the appellant's answer, no trial of any question of fact having been had.

THE RECORD.

The appellee, the United States of America, filed its bill of complaint in equity in the Circuit Court of the United States, Ninth Circuit, Northern District of California, alleging the passage of "An Act to create the California Debris Commission and regulate hydraulic mining in the State of California," approved March 1, 1893. (See Transcript, p. 1.) That, under and in compliance with said Act, the commissioners provided for therein had been duly appointed, and entered upon the discharge of their duties. (See Transcript, p. 2.) That the appellant, the North Bloomfield Gravel Mining Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its residence in San Francisco, California. That it is a gold mining company, and has its mines near the town of North Bloomfield, in Nevada County, California, and that said company carries on its mining operations by the hydraulic process, and that its mines are situated on or near the Yuba River and its forks and tributary branches, within the territory drained by the Sacramento River, and in the Northern District of California. (See Transcript, p. 3.) That the

waters used at said mine find their way, following their natural course, through navigable streams, bays, and straits, to the Pacific Ocean. (See Transcript, pp. 3, 4, and 5.) That the said company so discharges the mining debris from its said gold mine as that the same, or a portion thereof, is ultimately carried and flows into the Yuba River, its forks and tributaries, with mining debris from other mines operated by the hydraulic process, and is thence carried into the Feather and Sacramento Rivers and the bays and straits of the Northern District of California. (See Transcript, p. 5.) The bill of complaint then describes the process of hydraulic mining, being a method of washing gold-bearing gravel from its place of natural deposit, and separating the gold from the gravel and other like materials. (See Transcript, pp. 5, 6, and 7.) That the said company has never petitioned for, or obtained from, the California Debris Commission, any permit to mine by the hydraulic process, (See Transcript, pp. 7 and 8.) The prayer of the bill is for an injunction, restraining said company from doing any further hydraulic mining, until it shall have obtained a permit so to do from the said California Debris Commission. (See Transcript, pp. 8 and 9.)

L. L. Myers was made a party to the original bill, said bill stating that he was the superintendent of said company. Upon due proceedings had, an order was made, dismissing the bill as to said Myers. (See Transcript, pp. 15 to 19.)

The appellant demurred to the bill, on the ground that said bill had not made or stated such a cause as entitles the United States in a court of equity to any discovery

from said company, or to any relief against said company, as to the matters contained in said bill, etc., and asked to be hence dismissed, which demurrer was overruled. (See Transcript, pp. 20 to 23, inclusive.) The appellant thereupon duly filed and served its answer to the bill of complaint, admitting that the appellant was carrying on the business of hydraulic mining at the place alleged in said bill, but denied that said mines were situated on or near the Yuba River or any of its forks, but alleging that said mines were situated adjacent to Humbug Creek, a small tributary of one of the branches of the said Yuba River. Denied that the Yuba River is or ever was a navigable water, or a free highway for the use and purpose of navigation, except that portion of said Yuba River extending from its mouth up stream a distance of about one-half mile, and alleging that said portion of said Yuba River, at ordinary low stages, for more than thirty years, has not been navigable for steamers of any draught whatever. (See Transcript, pp. 24 to 27.)

The bill further denied that the appellant so dumped or discharged the mining debris from its said mines, or either or any of them, in such manner that the same or any material portion thereof is ultimately carried or flows into the said Yuba River, or that then, or with mining debris from other gold mines operated by the hydraulic process of mining, that the same is carried or flows into the Feather or Sacramento, or any other navigable streams, or thence into other waters, bays, or straits, in the bill of complaint mentioned. (See Transcript, p. 27.) The answer then alleges that all of the mining debris from its mines is dumped and discharged into impounding

basins and reservoirs, constructed upon its own lands at and adjacent to its said mines, and that no material part of such mining debris from its mines, etc., is carried from said impounding works, or flows into the adjacent streams or canyons, or any other place from which it is carried or moved by water into the said streams. The answer admits that an immaterial quantity of the smaller or lighter portions of said debris is carried down said streams, but denies that the same or any portion whatever of said mining debris is lodged or deposited in said rivers or any of them, or in their channels or any of them, or on the lands adjacent thereto or any of them; but on the contrary avers, that only a trifling quantity of such mining debris escapes from or passes beyond the impounding works and reservoirs of said appellant, and that the same consists solely of light, flocculent matter, of about the same specific gravity as water, and so finely comminuted as to readily float in and be moved forward by the slightest movement of the water in which it is suspended; and that all of said matter so escaping from or passing beyond appellant's impounding works, is carried in suspension in the streams of water of said streams, until it reaches the Suisun Bay; and that from the head of Suisun Bay, by the tidal currents, and movements of the water of said Suisun Bay, Carquinez Straits, San Pablo Bay, and the Bay of San Francisco, and the tidal currents passing in and out of the Golden Gate, it is carried and swept into the ocean, at distances remote from the land or navigable streams of the State of California, and does not deposit in any place where it either injures or threatens to injure any navigable waters within the juris-

diction of the United States. The answer further denies, that since the passage of said act, that any portion of the mining debris from its mines has been deposited or lodged, or is still being deposited or lodged, in the beds and channels, or the beds or bed, or channels or channel of said rivers or any of said rivers; and also denies that the same will continue to be so deposited or lodged from appellant's said mines, mining grounds or works, while such hydraulic mining continues, or otherwise, or at all. (See Transcript, pp. 28 and 29.) The answer admits that said company has never applied for or obtained a permit from the California Debris Commission to mine by the hydraulic process, and further alleges that it is not bound to file such petition, or to make the written conveyance provided for in said Act of Congress, but that said company has an option to or not to make or file, or present to or with said California Debris Commission, a petition or written deed or other instrument in writing, such as is referred to in paragraph VI, of said complainant's bill of complaint. (See Transcript pp. 30–31, paragraphs VIII and IX.) The answer then alleges that about the years 1887 and 1888, the respondent erected extensive and expensive impounding works upon lands patented to it by the United States, at and adjacent to its mines, and that the debris from its said mines and mining operations is deposited in said impounding works, and that none of said debris escapes from said impounding works, except some light flocculent matter of such slight specific gravity, that it will not deposit in water when affected by any movement, and that all of such matter escaping from said impounding works is carried by the current of

waters of Humbug Creek into Yuba River, by the currents of the Yuba River into the Feather River, and by the Feather River into the Sacramento River, and by the Sacramento River into Suisun Bay, where by the tidal and other currents the water is kept in constant motion, and from said Suisun Bay such light, flocculent matter is, by said currents and tides, carried through the Straits of Carquinez, San Pablo Bay, the Bay of San Francisco, and discharged into the Pacific Ocean at points remote from and out of the jurisdiction of the United States. (See Transcript, pp. 31–32, paragraph X.) The answer then alleges that heretofore a suit was brought by the same complainant against the same respondent, to enjoin it from operating its hydraulic mines, upon the ground that the debris from its mines injured, or threatened to injure, the same navigable waters and the lands adjacent thereto. That said suit was brought after said impounding works had been constructed. That a trial was had of said action, and that therein it was judicially and finally determined that the mining operations of said respondent, by use of said impounding works, neither did nor threatened any injury to any navigable waters, or any lands adjacent to such navigable waters. And the answer further alleged that the mining operations of said respondent ever since have been, and still are, conducted in the same manner and by the use of the same impounding works as were involved in said suit, and that its mining operations will not be conducted in any other or different manner than were determined in said action to be non-injurious. The answer denied all combination and confederacy, and was duly verified.

DEMURRER TO THE ANSWER.

The complainant demurred to the answer, on the ground that said answer neither made nor stated any case or defense to the equity or cause of action set forth in the amended bill of complaint, and in effect prayed for a judgment upon the pleadings. There were also exceptions to the answer, upon the same ground, and a motion to strike the answer from the files. (See Transcript, pp. 38 to 41.)

DECREE.

The Court, upon these pleadings, sustained the demurrer to the answer to the bill of complaint, and adjudged that the respondent be enjoined from conducting any further hydraulic mining operations until it should obtain a permit so to do from the California Debris Commission.

THE CASE IN BRIEF.

The complainant alleged that the respondent was mining by the hydraulic process upon the water-shed of the Sacramento River without first having obtained a permit from the California Debris Commission.

The answer admitted that the respondent had not obtained a permit from the California Debris Commission, and had never applied for one, or otherwise by its voluntary act, come under the jurisdiction of the Commission; but alleged that such mining operations as it conducted, or intended to conduct, neither did nor threatened any injury to any navigable waters or any lands adjacent thereto.

Without determining any issue so raised, the Honorable, the Circuit Court, decreed a final injunction against

the respondent doing any hydraulic mining until it should have obtained a permit from the California Debris Commission.

RESPONDENT'S POINTS.

The respondent makes two points:—

First: That, under the Act of March 1, 1893 (27 U. S. Statutes at Large, pp. 507–511), that one is not prohibited from carrying on the business of hydraulic mining without first granting to the United States the right to control its mining operations, as in said Act provided, and obtaining a permit from the California Debris Commission; but that said Act grants to the owner of a hydraulic mine the right to apply for such permit, upon the condition of making said grant; and that, if he obtains such permit, he obtains all the benefits, privileges, and advantages, which the law provides, under such permit.

Second: That, in no case, will a court enjoin the conduct of a lawful business, so long as the same is so conducted as neither to do nor threaten any injury whatever.

Point I.

That, under the Act of March 1, 1893 (27 U. S. Statutes at Large, pp. 507–11), that one is not prohibited from carrying on the business of hydraulic mining without first granting to the United States the right to control its mining operations, as in said Act provided, and obtaining a permit from the California Debris Commission; but that said Act grants to the owner of a hydraulic mine the right to apply for such permit, upon the condition of making said grant; and that, if he obtains such permit, he obtains all

the benefits, privileges, and advantages, which the law provides, under such permit.

The discussion of this point involves the relative powers of the State and of the Nation, as well as the right of the general government to interfere, except for purposes of revenue, police power, etc., with the ownership and use of private property held in private ownership within the limits of a state; and also the right of the general government to compel one who owns property, to grant the control of that property (which is the chief element of ownership) to the United States Government, and to obtain a permit from federal officers to use its property in a productive industry, when the actual and proposed use of said property neither does nor threatens any injury to anyone or anything. It is a well known fact that a large proportion of the agricultural lands on the water-shed of the Sacramento River cannot be cultivated for ordinary agricultural or horticultural purposes (as the plowing and other cultivation of the soil makes it loose and friable), without the result being that the winter rains wash some of the lighter portions of the soil into the navigable streams. The great Missouri River, and the Mississippi River below the mouth of the Missouri, and the James River, carry very large quantities of silt and other light flocculent matter, and this matter is largely the product of the cultivation of the fields. Would it be competent for the United States Congress to pass a law that no man should engage in agriculture, or plow or hoe, or harrow a field upon the water-shed of the Missouri River, or the Mississippi River, or the James River,

without first making a grant in the form of a deed, of the lands owned by the grantor, to the United States, granting to the United States, through a commission appointed by it, the right to say how much of his land the farmer should plow, or hoe or harrow, or how much wheat or corn he should raise, and compel the farmer, upon making such grant, to apply for a permit to farm and, without making such grant, or obtaining such permit, to provide that all farming within those vast water-sheds should be alsolutely prohibited until the owners of the land should surrender to the Government of the United States the entire control of their farming operations?

If that would not be rightful, within the powers of the general government, then certainly the right to mine by hydraulic process, which is a lawful, productive industry, by every natural right upon an equal footing with farming, cannot be constitutionally prohibited by the national government until the owner of the mine shall have, by writing, in the form of a deed, granted to the general government the right, by commission, to determine how much mining he shall do.

Under the law and the pleadings in this case, should the demurrer to the answer be sustained? That is the question involved. Differently stated, the question is: Must one be enjoined by the Court, who, without permit from the California Debris Commission, mines by the hydraulic process, but thereby neither does, nor threatens, injury to the navigable streams, nor to the lands adjacent thereto?

Hydraulic mining, in itself, is not an unlawful, illegitimate, or wrongful business.

This has been judicially determined.

County of Yuba v. *Cloke*, 79 Cal., p. 239.

In this case the Court in Bank says (*Vide*, p. 243):

" It seems to us, it must be conceded that the business " of hydraulic mining is not within itself unlawful, or " necessarily injurious to others. The unlawful nature " of the business results from the manner in which it is " carried on, and the neglect of parties engaged therein " to properly care for the debris resulting therefrom, " whereby it is allowed to follow the stream, and " eventually cause injury to property situated be- " low. * * * The business of hydraulic mining, " properly conducted, is lawful."

This decision preceded the legislation involved, which complainant's counsel designates in his brief as the "Caminetti Act." Then, as that Act relates alone to California, the Act will be construed as passed with relation to that decision, and as subject to construction by reference to it. But the Act in question bears evidence, inherent, that it was framed with reference to this decision, and to the principle declared in the decision.

Section 3 provides: " Hydraulic mining, as defined " in Section eight hereof, *directly or indirectly injuring* " *the navigability of said river systems*, carried on in said " territory, other than as permitted under the provisions " of this Act, *is hereby prohibited and declared unlawful.*"

And again, in Section 22: " And any person or per-

"sons, company or corporation, their agents or employes, "who shall mine by the hydraulic process, *directly or* "*indirectly injuring the navigable waters of the United* "*States*, in violation of the provisions of this Act, shall "be guilty of a misdemeanor, and upon conviction "thereof shall be punished by fine," etc.

It is provided by Section 4 that "it shall be the duty "of said Commission to mature and adopt such plan or "plans * * * as it may deem necessary, as will "improve the navigability of all the rivers comprising "said systems, deepen their channels, and protect their "banks. Such plan or plans shall be matured with a "view of * * * *and permitting mining by the* "*hydraulic process*, as the term is understood in said "State, to be carried on, *providing the same can be* "*accomplished without injury to the navigability of said* "*rivers, or the lands adjacent thereto.*"

In the quotations is a clear recognition of the principles announced in the case of *Yuba County* v. *Cloke*, *supra*.

The Act under consideration involves, apparently, four purposes:

(1) The appointment of the California Debris Commission by the President of the United States, and its organization;

(2) That the Commission shall collect information with regard to hydraulic mining, "debris from mining opera- "tions, natural erosion, or other causes," and the navigable waters, and furnish the same to the proper department of the United States Government;

(3) That the Commission shall devise and report meth-

ods of improving the navigable streams, and impounding mining debris, and for the construction of such general works as will permit hydraulic mining without injury to the navigable streams or the adjacent lands;

(4) To hear applications and grant permits to individual mine owners to erect impounding works, and provide for the impounding of the debris from their several respective mines.

The proper construction of the Act will be aided by a consideration of the foregoing classification.

Section 3 provides that "the jurisdiction of said Com-"mission, in so far as the same affects mining carried on "by the hydraulic process, shall extend to all such min-"ing in the territory drained by the Sacramento and San "Joaquin River systems in the State of California." Then, after prohibiting hydraulic mining injuring the navigability of said river systems, it proceeds to define what that jurisdiction is. The Act then provides for examinations and reports of the hydraulic mines, debris, and Sacramento and San Joaquin River systems.

The jurisdiction, territorily defined, is "the territory "drained by the Sacramento and San Joaquin River "systems." (*Vide*, Sec. 3.)

The subjects of its jurisdiction are:

(1) To mature and adopt plans, from examination and surveys, to improve the navigability of the rivers; such plans to be effective against mining debris, with a view of restoring the original condition of the rivers, and permitting mining by the hydraulic process, where it can be carried on without injury to the navigability of the rivers or the lands adjacent thereto. (See Sec. 4.)

(2) To examine, survey and determine the utility and practicability of storage sites and settling reservoirs; to improve and protect the navigable rivers by preventing deposits therein of debris resulting from mining operations, natural erosion, or other causes; to investigate such hydraulic and other mines as are, or have been, worked by methods intended to restrain the debris by impounding dams, etc., and make such study and researches of the hydraulic mining industry as will be useful in devising a method, or methods, whereby such mining may be carried on. (Section 5.)

(3) From time to time to note the conditions of the navigable channels of said river systems. (See Sec. 6.)

(4) To make reports annually to the Chief of Engineers, for the information of the Secretary of War, of its labors, plans and estimated cost of such works as it shall recommend. (See Sec. 7.)

(5) To grant to such mine-owners as shall properly petition therefor, and accompany such petition with the requisite grant, permission to mine by the hydraulic process, upon such terms and conditions, and subject to such requirements, as the Commission shall make, and to modify or revoke such permits and orders. (See Sections 9, 10, 11, 12, 13, 14, 18 and 19.)

And generally, the subject of the jurisdiction of the Commission, so far as hydraulic mining is concerned, is to examine, report, adopt plans, grant permits to mine by the hydraulic process to those who apply, and to modify or revoke such permits.

The jurisdiction exercised by said Commission under the 5th head (as above designated), viz: to grant a per-

mit to mine by the hydraulic process, is acquired, by the proprietor of a hydraulic mine filing with the Commission, a petition, in manner and form as provided by said Act. (Sec. 9): Such petition to be "accompanied " by an instrument, duly executed and acknowledged, " as required by the law of the said State," (California) " whereby the owner or owners of such mine or mines " surrenders to the United States the right and privilege " to regulate by law, as prescribed by this Act, or any " law that may hereafter be enacted, or by such rules " and regulations as may be prescribed by virtue thereof, " the manner and method in which the debris resulting " from the working of said mine or mines shall be re- " strained, and what amount shall be produced there- " from." (Sec. 10): The Commission shall publish a notice of the filing of such petition, for the time, and in the manner and form, prescribed in the Act, " fixing a " time previous to which all proofs are to be submitted."

By these proceedings, the California Debris Commission (in judicial language) obtains jurisdiction to hear and determine the right of the petitioner to a permit to mine by the hydraulic process.

" On or before the time so fixed " (in said published notice) "all parties interested, either as petitioners or " contestants, whether miners or agriculturists, may file " affidavits, plans and maps in support of their respec- " tive claims." " Pending publication " (of the above notice), " the Commission, or a committee thereof, shall " examine the mine and premises in such petition." (Sec. 12.)

But these permits, under the terms of the Act, are granted upon one of two conditions:

(a) If no impounding works have already been constructed, in case a majority of said Commission "concur "in a decision in favor of the petitioner," "the Com- "mission shall make an order directing * * * what "restraining or impounding works * * * shall be "built and maintained; how and of what material; "where to be located; * * * as will prevent injury "to the said navigable rivers, and the lands adjacent "thereto." (Sec. 13.)

"That petitioner * * * must present plans and "specifications of all works required to be built in pur- "suance of said order, for examination, correction and "approval by said Commission," and upon approval of the same, the impounding works shall be constructed under the supervision of the Commission. "Upon com- "pletion thereof" (that is, of the impounding works, according to the approved plans) when approved, after completion, by the Commission, "permission shall there- "upon be granted to the owner or owners of such mine "or mines, to commence mining operations, etc. (Sec. 14.)

(*b*) Or, the intending petitioner may first construct impounding works, and then petition the Commission for a permit to mine, and "if said Commission shall be "of the opinion that the restraining and other works "already constructed at the mine or mines shall be "sufficient to protect the navigable rivers of said sys- "tems and the work of said Commission, then the owner

" or owners may be permitted to commence operations." (Sec. 15.)

The only other provision, or rather word of the Act, to which we deem it necessary to call the attention of the Court, is the word "*must*," as it occurs in Section 9, with its context, as follows:

"Sec. 9. That the individual proprietor or proprie-
" tors, or in case of a corporation, its manager or agent
" appointed for that purpose, owning mining ground in
" the territory in the State of California mentioned in
" section three hereof, which it is desired to work by the
" hydraulic process, must file with said Commission a veri-
" fied petition, setting forth such facts as will comply
" with law and the rules prescribed by said Commission."

We have quoted thus in extenso from the Act of Congress and sought, with a degree of thoroughness, to analyze this Act of Congress, because by these means we hope to aid the Court in forming its conclusions as to the correct construction of the Act, so far as its provisions are involved in the true solution of the questions now involved in the case at bar.

One other consideration as basis for our discussion of the question.

The conditions at the time of the passage of the Act were as follows:

The U. S. Courts for this circuit had clearly and unmistakeably announced the power of the Court to protect the navigable waters of the State from injury to navigation, by injunction; and also the power of the Court, where the citizenship of the parties brought them within the jurisdiction of the Court, by injunction, to protect the

lands adjacent to the navigable streams from permanent and irreparable injury. by hydraulic mining.

The *nisi prius* courts, and Supreme Court of California, had clearly announced the right to protect, by injunction, lands in private ownership, from irreparable injury by hydraulic mining.

Hydraulic mining on the water-shed of the Sacramento River had not been all stopped. But all mines doing, or threatening irreparable injuries, had probably been stopped. But there were, and are, many mines so situated, or so operated, that their mining operations neither did nor threatened injury, and in the case of most of these mines, either no injunction had been sought against them, or upon a trial of the questions of fact involved, it had been judicially determined that their operations neither did nor threatened injury. Among the latter class was the very mines which it is sought to enjoing in the case at bar. This is a proper fact to argue on this demurrer; for it appears in the records of this Court; the case was elaborately tried in this Court, and resulted in a painstaking and elaborate opinion, in which it was judicially determined that the method of conducting its operations, and impounding, successfully protect from injury the navigable waters of the United States, and adjacent lands. And this in a suit by the United States against the same respondent, who is the respondent in the case at bar. The decision was rendered October 5, 1892, and is reported in the Federal Reporter, 53 vol., page 625.

Now, taking into consideration the large number of mines of the first class above, which, owing to their

situation, locality and natural surroundings, long have been, and long can be, operated, without doing or threatening any injury whatever to any one, and without any impounding works whatever (and notably in Plumas County), where impounding works are not necessary, and could not possibly serve any useful purpose; and then, reading the Act of Congress, which only authorizes the California Debris Commission to issue a permit when impounding works have been constructed and approved by the Commission, we have counsel for complainant contending that the Court should so construe this Act as that these mines, which neither do nor threaten injury, shall not be operated at all until their owners shall have constructed impounding works, which are not needed, and which could serve no useful purpose. Such construction would not only be absurd, but *would be contrary to natural right.*

What is the proper construction of the language of this Act of Congress?

This involves careful and correct judicial investigation.

We submit three propositions on this point, claiming:

First: That the act *permits* the owner of a hydraulic mine to apply for a permit to mine by the hydraulic process, and if he obtains the permit, in accordance with the terms of the Act, so long as he mines in accordance with the terms of the permit and the rules and orders of the Commission, he is protected fully from any hostile action by the U. S. Government; being so protected by the Act of Congress.

Second: That the Act does not compel a mine-owner

to apply for a permit, before he can mine by the hydraulic process; but if he so mines, without the permit, he will be subject to all proceedings, injunctions and penalties, and in the same courts, to which he would have been subject if this Act of Congress had never passed, and is also subject to the criminal prosecution and penalty, by virtue of this Act, provided in Section 22 of the Act, including fine and imprisonment, this penalty being applicable to the owner and employee.

Third: That no injunction will issue in any case, except to prevent threatened *injury*.

We do not contend, nor have we contended, that the Act is unconstitutional, but we do insist that the construction contended for by complainant's counsel would render the Act both unconstitutional and against natural right.

The *power of Congress* over the subject-matter of this legislation rests entirely upon the provision of the U. S. Constitution, and the Act admitting California into the Union.

The power of this Court in this case depends upon the Judiciary Act and the Caminetti Act.

The only provisions of the U. S. Constitution applicable are:

Sec. 8, of Art. I:

" The Congress shall have power * * *

" To regulate commerce with foreign nations, and " among the several States."

Amendment IX:

" The enumeration in the Constitution of certain rights

" shall not be construed to deny or disparage others " retained by the people."

Amendment X:

" The powers not delegated to the United States by " the Constitution, nor prohibited by it to the States, are " reserved to those States respectively, or to the people."

Section 10, of Article I:

The limitation of powers of the individual States contains nothing in any way applicable to this matter.

9 U. S. Statutes at Large, pp. 452-3, " An Act for the Admission of the State of California into the Union," provides:

" Sec. 3. That the said State of California is admit- " ted into the Union upon the express condition * * * " *That all of the navigable waters within the said State* " *shall be common highways*, and forever free, as well to " the inhabitants of said State as to the citizens of the " United States, without any tax, duty or impost there- " for."

This portion of the Act admitting California into the Union, above quoted, is copied from the Ordinance of the Old Congress for the government of the territory northwest of the Ohio River, passed July 13th, 1787, and in one way or another has been incorporated into the compacts admitting the different States (except the original 13) into the Union. We refer to this fact, because in nearly all of the decisions relating to the construction of the commerce and navigation clause of the National Constitution, this language has been referred to in the opinions. These compacts are binding, morally and

legally, between the various States and the nation, and express clearly the joint and several duty and obligation of the parties to those several compacts.

The Commerce and Navigation Clause of the Constitution.

Commerce is defined as "The exchange of goods, pro-
"ductions, or property of any kind; especially exchange
"on a large scale, as between States or nations."

See Standard Dictionary, Burrill's Law Dictionary, Rapalje and Lawrence's Law Dictionary.

Navigation is defined as "The act of navigating; the
"moving over water in vessels."

Vide Standard Dictionary.

Mr. Burrill, in his Law Dictionary, gives the following definition:

"Navigation. The act of navigating or passing on
"water in ships or other vessels.—*Webster.*

"The management of ships or vessels (citing 3 Kent's,
"Com. 159.)

"Commerce or intercourse by means of shipping.
"(Citing) Marshall, Chief Justice, 9 Wheaton's Reports,
"189–196; the Passenger cases, 7 Howard's Reports,
"283 *et seq.*"

The latest definition of commerce that we find by our Supreme Court (see Gloucester vs. Penn., 114 U. S. p. 196):

"Commerce with foreign nations and between the
"States consists of the transportation of persons and
"property between them."

By what degree of ingenuity it can be contended that

the floating of light particles of flocculent matter, or in other words roily water, in navigable streams, constitutes *commerce*, or is included within the terms "commerce" or "navigation," we have not been able to ascertain. We submit that it is entirely foreign to, and in no sense included within those terms. Its only true relation to the question involved is, as to whether or not it tends or threatens to obstruct commerce or navigation.

The Commerce and Navigation Clause of the Federal Constitution, and the navigable waters provision above quoted, contained in the Act admitting California, have been the subject of frequent judicial inquiry.

What are the respective rights, and jurisdiction of the General Government and the several States over the navigable waters, (and the lands underlying them), within the territorial limits of a State?

Upon this point we submit the following authorities:

1 Kent's Commentaries, p. 494.

After discussing *Gibbons* v. *Ogden*, which involved the right of New York State to grant to Livingston and Fulton (the latter the inventor, and the former the capitalist who introduced steam navigation,) the exclusive right to navigate the Hudson River (annulling the same;)

Also the Embargo Act (sustaining it;)

Also the question of the right of a State to require an importer to pay a tax on each package imported (annulling it;)

Also the right of Congress to control the action of a State in erecting or authorizing dams in navigable streams (affirming it;)

The learned author uses the following language (pp. 494–5):

"It has been held that if Congress, in the execution of " the power to regulate commerce, should pass a statute " controlling State legislation in erecting dams over small " navigable creeks, where the tide ebbs and flows, it " would be valid and binding. But until Congress had " actually exercised their power over the subject, the " State legislation was not considered in that case as re- " pugnant to the power in Congress in its *dormant* state " to regulate commerce. It is admitted, however, that " the grant to Congress to regulate commerce on the " navigable waters of the several States, contains no " cession of territory, or of public or private property; " and that the States may, by law, regulate the use of " fisheries and oyster beds, within their territorial limits, " though upon navigable waters, provided the free use of " the waters for navigation and commercial intercourse " be not interrupted."

18 Howard (U. S.), p. 71; (15 L. C. P. Co., p. 269); *Smith* v. *The State of Maryland.*

In this case a ship had been duly licensed for the coasting trade and fisheries by the U. S. The owner (Smith, the plaintiff,) being a resident of Pennsylvania, and the ship duly enrolled at Philadelphia, was seized and condemned in the Courts of Maryland, under a statute of that State, providing for such proceedings, in case of fishing for oysters with certain prohibited implements.

Inter alia, the Court said:

"In considering whether this law of Maryland belongs " to one or the other of these classes of laws (quarantine,

" etc.,) there are certain established principles to be kept " in view, which we deem decisive:

" Whatever soil below low-water mark is the subject " of exclusive propriety and ownership, belongs to the " State, and on whose maritime border, and within " whose territory it lies, subject to any lawful grants of " that soil by the State, or the sovereign power which " governed its territory before the Declaration of Inde- " pendence." (Authorities.)

" The State holds the propriety of this soil for the con- " servation of the public rights of fishery thereon, and " may regulate the modes of that enjoyment so as to pre- " vent the destruction of the fishery. In other words, it " may forbid all such acts as would render the public " right less valuable, or destroy it altogether. This power " results from the ownership of the soil, from the legisla- " tive jurisdiction of the State over it, and from its duty " to preserve unimpaired those public uses for which the " soil is held. * * *

" The law now in question is of this character."

4 Otto, 391. *McCready* v. *Virginia*, (24 L. C. P. Co., p. 248).

Each State owns the tide-waters and beds of all tide-waters within its jurisdiction. Subject to the paramount right of navigation, fisheries remain under the exclusive control of the State.

" The principle has long been settled in this Court, " that each State owns the bed of all tide-waters within " its jurisdiction, unless they have been granted away. " (Authorities.) In like manner the States own the tide- " waters themselves, and the fish in them, so far as they

"are capable of ownership while running. For this "purpose the State represents its people, and the owner- "ship is that of the people in their united sovereignty."

"A State can grant to its own citizens the exclusive "use of lands covered by water, for raising oysters, and "may prohibit, under a penalty, their use for such pur- "poses by citizens of other States." * * *

"Neither do we think this case is at all affected by "the clause of the Constitution which confers on Con- "gress power to regulate commerce."

2 Otto, 542. *U. S.* v. *Cruikshank*, (23 L. C. P Co., p. 589).

Every republican government is in duty bound to protect all its citizens in the enjoyment of an equality of right.

There is not in the Act anywhere any attempt to prohibit or inhibit, or punish any hydraulic mining, except such as does, or threatens injury to the navigability of the streams or the lands adjacent thereto. If an Act is to be construed according to its language, where is the language in this Act requiring or authorizing an injunction of an hydraulic mine which neither does nor threatens injury?

In the Circuit Court, counsel for complainant contended that "Congress, under its commercial powers, *can control the navigable waters* of the Sacramento River and its tributaries."

We submit, the correct statement is, that Congress can control commerce and navigation on the navigable portions of the Sacramento River and its tributaries, which

we submit is a very different proposition. Congress also has power to prevent the obstruction of navigable streams, or interference with interstate or foreign commerce.

Jurisdiction in a court, is the right to decide an issue right or wrong. Jurisdiction to pass a law on a given subject, is the right to pass a good law, or an evil one. But it is not, as contended for by complainant, the arbitrary right to pass any kind of a law, and make it valid; for if such law be unconstitutional, or against natural right, the courts will declare it invalid. If a Democratic Congress should pass a law that the holding of Republican political meetings in San Francisco constituted an obstruction to the navigation of the Sacramento River, we submit that there can be no question as to what the courts would decide as to its validity. And yet it is contended in this case by complainant's counsel that Congress can arbitrarily determine what is, and what is not an injury to the navigable waters. The true and established rule with regard to legislative power is, that the power to legislate concerning a subject, being granted, the power may be exercised within constitutional limitations, but not against natural right.

The cases, *Gloucester Ferry Co.* v. *Penn*, and *Mobile Co.* v. *Kimball* (cited and quoted by counsel below) have no pertinency; the former decided, substantially, that the States have no power to tax interstate commerce; and the latter decides that a State may lawfully expend money in the improvement of navigable water-ways within its limits, provided such improvements are not prohibited by Congress.

Congress has (in the Act under consideration) decided

what constitutes an injury, or violation of the national rights, in unmis'akable terms, where it says, in Sec ion 22: "And any persons, etc., who shall mine by the hydraulic process, directly or indirectly injuring the navigable waters of the United States, in violation of the provisions of this Act, shall be guilty, etc., and punished," etc.

Will a law be construed to inderdict the pursuit of a legitimate productive industry in an entirely harmless manner, unless such law in plain terms, interdicts, or prohibits it? Can a court inject language into the belly of an Act of Congress to sustain a contention that a legitima'e industry, pursued in an innocuous manner, should be enjoined?

The Court will observe, that all through the Act of Congress involved, the only thing in any manner interdicted or prohibited is hydraulic mining injuring or threatening to injure the navigable streams or lands adjacent thereto; but in this statement we do not overlook the use of the word "must" in Section 9 of the Act, where it is provided that one desiring "to work by the hydraulic process must file with said Commission a verified petition," etc., and in section 10, that "said petition shall be accompanied by an instrument * * * whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the debris resulting from the work-

ing of said mine or mines shall be restrained, and what amount shall be produced therefrom."

At the argument in the court below, complainant's counsel laid stress upon the use of this word "must" in said section 9.

"MAY" AND "MUST."

"May" and "must," judicially, are often construed interchangeably; and we contend that under the terms of this Act, and in order to make the same a constitutional act, that the word "must" is to be construed "may," and that this can be done with propriety, and is the proper construction of the word in this act.

MUST.

We contend for no forced or unusual construction of the word must in Section 9 of the Act.

To illustrate, if a State statute provided that one desiring to obtain a judgment of a certain character, "must file a complaint," the word would be more appropriate than "may file a complaint." So, in the statute under consideration, one desiring a permit, must file a petition. But, in construing an Act, as in construing a contract, the instrument must be taken by its four corners, and all of its terms and provisions considered and construed together.

The authorities to sustain our contention are quite numerous, and have been the subject of approval by text writers of reputation, especially in works and articles upon Statutory Construction. We cite the following:

Jenkins v. *Putnam*, 12 Northeastern Reporter, p. 613 (N. Y. Court of Appeals, June 28, 1887);
Spears v. *Mayor of New York*, 72 N. Y. 442;
Wallace v. *Feeley*, 61 Howard, p. 225, and
Wallace v. *Feeley*, 88 N. Y., 646.
Merrill v. *Shaw*, 5 Minn., p. 148.

In all of these cases the word "must," in the different stautes under consideration, was construed as permissive, and not imperative.

It is even recognized and stated by the Law Dictionaries.

See Rapalje & Lawrence's Law Dictionary, "Must."

Endlich on the Interpretation of Statutes, p. 428, Sec. 312, in discussing this subject, of when permissive words in a statute are to be construed as mandatory, and when mandatory words are to be construed as permissive, uses the following language: "But as will hereafter appear, "it is even reasonable to suppose that in using language "mandatory in its strict grammatical sense, it attached to "it the meaning and effect of permissive words only."

See also Sec. 316 of same work; and
Fowler v. *Pirkins*, 77 Ill., 271;
Wheeler v. *Chicago*, 24 Ill., 105;
R. R. Co. v. *Hecht*, 95 U. S., 168, 170.

It is the old question of mandatory or declaratory, imperative or permissive, which so often arises in the construction of statutes, which in the main are decided upon the basis of presumption. The intention of the Legislature, being the subject of the presumption, and in

general depending upon the same rules that are applied as between strict construction (tending to limit the application) and liberal construction (tending to extend the application) of the statute. They are the rules applicable as between two possible constructions. We state them.

1. "All statutes which encroach on personal or property rights of the individual are to be construed strictly."

2. "Statutes which prescribe the manner in which persons shall use their private property, or restrict and regulate the disposition thereof, are against common right, and must be construed strictly."

3. "Statutes passed in the exercise of the police power of the State, restricting and regulating property rights, *or the pursuit of useful occupations and callings*, are to be construed strictly."

We do not cite authorities upon these rules, because we deem it unnecessary. We have copied them from pp. 383–6, Vol. 23, Am. & Eng. Encyclopedia of Law, where whole pages of authorities are given in the notes.

We have thus shown, as we contend, that the same word may be construed as either permissive or imperative, according to the circumstances, the context, and the rules of construction.

As between two possible constructions, that construction will be adopted which renders the Act constitutional, not against natural right, and not destructive of property rights. (This subject will be further discussed with authorities, later in this brief.)

But suppose that there had actually been inserted in

the Caminetti Act, at the end of Section 10, in words: "Each and every person mining by the hydraulic process within the territory drained by the Sacramento River, without having first obtained a permit so to do from the California Debris Commission, shall be enjoined by the United States Courts at suit of the United States, even though such hydraulic mining neither does nor threatens injury."

Then what? Then, we contend, the United States would not be entitled to an injunction, when there was no injury done or threatened.

And our contention is sustained by authority; by judicial decision so clear and strong, so rich in the statement of the fundamental principles of our form of constitutional government, that there is no escape from either its reasoning, deductions, or conclusions. We quote in extenso from the case below.

It was urged at the argument, by Mr. Devlin, that if the North Bloomfield Gravel Mining Co. were not enjoined, that other mining companies, which might do injury, would thereby be encouraged to carry on mining operations; the intendment, doubtless, being that owing to the high character and standing of the President, Secretary, and members of the Board of Directors of the North Bloomfield Gravel Mining Company, that its example would be followed by others, less scrupulous to observe the law of the land and the rights of others. This proposition is also fully answered by the same case (if it requires answer).

The case referred to is *City of Janesville et al.* v. *Car-*

penter, 77 Wisconsin, p. 288, also reported in 46 Northwestern Rep, p. 128.

Syllabus: "1. In a suit by a city for an injunction to "restrain defendant from driving piles into the bed of a "river (the same being there navigable in fact, and by "legislative enactment declared so to be), and erecting a "building thereon, the petition states no cause of action "where it merely alleges that the effect of defendant's ex-"ample in erecting such building will be that others will "do likewise, to the injury of complainant in respect to "the public health, equal taxation, and liability to fire and "flood.

"2. Nor does it state any cause of action in favor of "a private corporation, that makes use of water-power "furnished by the river, where it alleges that such build-"ing will obstruct the flow of the water, and cause it to "back up to the place where the water is discharged from "complainant's water-wheels 'to some extent,' but fails "to allege any injury on account of it.

"3. The fact that the erection of a building is pro-"hibited by an ordinance of a city is no ground for an "injunction against it.

"4. Laws Wisconsin, 1887, c. 423, provides that 'it "shall be unlawful and presumptively injurious * * * "to person and property to drive piles,' etc., 'in Rock "River, within the limits of the County of Rock; and "the doing of any such act shall be enjoined at the suit "of any resident taxpayer, without proof that any injury "* * * has been or will be sustained by reason of "such act;' and, further, that it may be enjoined at the "suit of any one having the use of the water-power of

" the river in said county without other proof than that " the act will cause the river to 'rise or set back to some " extent at the place, where the water used to operate " his mill or factory is discharged into the river.' *Held*, " that the act is void, as it deprives riparian owners of " their property in the river without compensation, and " without due process of law.

" 6. In the enactment of such statute the Legislature " usurped the judicial power, by declaring an act unlaw- " ful, and commanding the courts to enjoin it, without proof " that any injury has been caused by it, and violated " Const. Wis., Art. 7, Sec. 2, which provides that the " judicial power of the State shall be vested in the " various courts.

" 7. Such statute is discriminating and class legisla- " tion, and as such is contrary to the spirit of the federal " and State Constitutions, and to the principles of civil " liberty and natural justice."

Opinion: The complaint charged the threatened construction by the defendant of a building supported by numerous piles driven into the bed of the river, without the permission of, or an order from, the common Council of said city, such permission being required by an ordinance of said city, and that defendant had commenced the driving of such piles in the bed of said river for such purpose. That the said river is Rock River, and that said river is navigable in said place. That the consequences of permitting the defendant to so erect said building as affecting the interests of the City of Janesville, will be that others will soon erect buildings fronting on said bridges, and sup-

ported in like manner, until the whole space over said river, on both sides of said bridges, is occupied by similar buildings fronting on said bridges, and extending up and down said river a distance of about 100 feet from the sides of said bridges; and by reason thereof the flow of the water in said river will be further permanently obstructed, and the interests of said city and its inhabitants greatly prejudiced and injured by obstruction to the circulation of air, and in respect to the dangers of fire and flood, and to the public health, and as respects equality in the matter of taxation and assessments and the benefits thereof, and that said building will be in violation of an ordinance of said city against erecting any buildings in said river. * * * That Rock River is a public highway, and has been returned as navigable, and has been meandered. That the width of the river has already been diminished one-third, and the waters have been set back as far as the dam, and that said bridges have obstructed the flow of the river to a considerable extent, and that the abutments and piling thereof in the bed of the river, and the filling in of earth and other materials, and placing the foundations, walls and piers for the support of the building, and the throwing in of ashes and other materials in the bed of the river, have greatly obstructed the river between said bridges and other localities, and that there is danger that other buildings and obstructions will be placed in the river by the example of the defendant. * * * The defendant answered, amongst other things, that the river is navigable, in fact, that the bridges are old and dilapidated. Denies all the speculative and predicted conse-

quences which the complaint alleges, and some other immaterial allegations, and admitting the other allegations of the bill of complaint. Affidavits were introduced, showing that the injuries resulting from the construction of the building would be slight. The Court says, after stating the facts:

"What effect, if any, this proposed building, by its "example, may have in any such direction, so as to in- "jure any private or public interest, is left to mere pre- "diction and conjecture. The action does not involve "any question of obstruction or injury to navigation, or "of injury to any public right. * * * The com- "plaint does not show that the proposed building would "be a private or a public nuisance." (The lower court granted the injunction.) * * * "It is not alleged "that the public will suffer by this one building at all, "but by a row of buildings which somebody might erect "in following the example of the defendant. * * * "It is only when such similar buildings erected by "others fill that whole space that it is claimed in the "complaint that the dangers," etc., "will even arise or "occur." The only injury to these interests that is "alleged is from what somebody else may do in the "future, through the influence of the defendant's ex- "ample. * * * This is a most remarkable case, and "there has never been anything like it. It is not "charged that the proposed building will in itself do any "harm in any respect whatever, * * * but that it "may possibly be followed by an example by others in "building buildings which may possibly do harm. It "would be a new case where one had actually done

" something in itself right and harmless, and he should " be sued, because others had done something wrong " and injurious by following his example, and it would " be a strange case to enjoin one from doing some- " thing wrong and injurious, by following his ex- " ample. * * * As to the other plaintiff, it is " not even inferentially stated that it would be any " injury at all to it. * * * Should a court " of chancery enjoin the defendant from erecting his " building on his own land, on such an allegation as " this? We think the learned counsel of the appell- " ant is right in claiming that the complaint does " not charge facts sufficient to state any cause of action " known to the general laws of the land and the practice " of courts, in favor of either plaintiffs. * * * But, " even if the complaint sufficiently charged that the con- " sequences predicted would be produced by the proposed " building, the city of Janesville has no such corporate " interest in them as would authorize it to maintain such " an action." (Authorities.) " But it is sufficient that " no wrong, injury or damage is charged. * * * As " a private nuisance or a public nuisance, by which some " private person has suffered by special and peculiar " injury, there must be material annoyance, inconveni- " ence, discomfort or hurt, and the violation of another's " rights in an essential degree." (Citing Wood on Nuisances, 1, 3, 4.) " The law gives protection only against " substantial injury, and the injury must be tangible, or " the comfort, enjoyment or use must be materially im- " paired." (Authorities.) " It is a maxim of the law " that wrong without damage, or damage without wrong,

" does not constitute a cause of private action. It is " charged that this building will be in violation of an " ordinance of said city. That would not give a cause of " action for an injunction, even if the ordinance so pro- " vided." (Authorities.) * * *

"The learned counsel of the respondent cites chapter " 423, Laws 1887, in support of the action. * * * " The first section is as follows: 'It shall be unlawful " and presumptively injurious and dangerous to persons " and property to drive piles, build piers, cribs, or other " structures, * * * in Rock River, within the limits of " the County of Rock, and the doing of any such act " shall be enjoined at the suit of any resident taxpayer, " without proof that any injury or danger has been or " will be caused by reason of such act.' * * * 'Sec. 2. " The doing of any such act shall also be enjoined at the " suit of any owner or lessee of the right to use water " of said river to operate any mill or factory within said " county, without proof of any further fact than that " such act will cause the water of said river to rise or set " back, to some extent, at the place where the water " used to operate such mill or factory, is discharged into " said river.' * * *

" The learned counsel of the appellant contends that " this Act is unconstitutional, and therefore void. The " Legislature would have saved time and expense if " it had issued the injunction in the case for which the " Act was made. This is the first time that any Legis- " lature of any enlightened country ever attempted to " create an action without a cause of action, to authorize a " complaint to be made to a court when there is nothing

" to complain of; to compel the courts to enjoin the law-
" ful use and enjoyment of one's own property 'without
" proof that any injury or danger has been or will be
" caused by reason of such Act,' to create a cause of ac-
" tion without wrong, injury, or damage; to authorize an
" action to be brought by a person without any interest
" in the subject matter; * * * to make that act unlaw-
" ful and actionable in one county and as to one river
" that is lawful in all other counties and as to all other
" rivers, under precisely the same circumstances"; (the same thing in principal is attempted in the Act under consideration) "or to adjudicate and decide the case, and
" then order and compel the Court to execute its judg-
" ment by issuing an injunction. These are some of the
" strange and novel propositions of this statute. That
" Thomas Lappin, the owner in fee of this ground, has
" the right to use and enjoy it to the center of the river,
" in any manner not injurious to others, and subject to
" the public right of navigation, has been too often de-
" cided by this Court and other courts to be questioned.
" As a riparian owner of the land adjacent to the water,
" he owns the bed of the river *usque ad filum aquae*, sub-
" ject to the public easement, if it be navigable in fact,
" and with due regard to the rights of other riparian
" proprietors. He may construct docks, landing places,
" piers and wharves out to navigable waters, if the river
" is navigable in fact, and if not so navigable, he may
" construct anything he pleases to the thread of the
" stream, unless it injures some other riparian proprietor,
" or those having the superior right to use the waters
" for hydraulic purposes." (Authorities.) "Subject to

" these restrictions, he has the right to use his land un-
" der water the same as above water. It is his private
" property under the protection of the Constitution, and
" it cannot be taken, or its value lessened or impaired,
" even for public use, without compensation, or without
" due process of law, and it cannot be taken at all for any
" one's private use.

" This statute makes it unlawful for the defendant who
" owns this ground " (as the respondent in the case at bar owns its land under United States patent, as alleged in the answer), " and has the right to use it under said Lap-
" pin, to drive piles into it anywhere within the river for
" any purpose. It prevents the lawful use of his prop-
" erty. It takes away from him, without compensation
" or due process of law, and denies the defendant the
" equal protection of the laws. It is, therefore, in direct
" violation of Articles V and XIV of the Amendments of
" the Constitution of the United States, and of Section
" 13 of Article I of the State Constitution, and is, there-
" fore, void. * * * Any restriction or interruption
" of the common and necessary use of property that de-
" stroys its value, or strips it of its attributes, or to say
" that the owner shall not use his property as he pleases,
" takes it in violation of the Constitution," (citing *Pum-
" pelly* v. *Green Bay Co.*, 13 Wall. 166; *Wynehamer* v.
" *People*, 13 N. Y. 378; *People* v. *Otis*, 90 N. Y. 48
" *Hutton* v. *City of Camden*, 39 N. J. Law, 122).

" The Legislature usurped the judicial power of the
" courts by the enactment of this statute. It adjudicates
" an act unlawful and presumptively injurious and dan-
" gerous, which is not, and cannot, be made so without a

" violation of the constitutional rights of the defendant, " and imperatively commands the court to enjoin it with- " out any proof that any injury or danger has been, or " will be, caused by it. * * * It violates Section 2 " of Article VII of the State Constitution, which pro- " vides that the judicial power of the State, both as to " matters of law and equity, shall be vested in the various " courts. It takes away the jurisdiction of the courts to " inquire into the facts and determine the necessity and " propriety of granting or refusing an injunction in such " a case, according to the established rules of a court of " equity. (Ervine's Appeal, 16 Pa. State, 256.) It is " said in that case: 'That is not legislation which adju- " dicates in a particular case, prescribes the rule, con- " trary to the general law, and orders it to be enforced. " Such power assimilates itself more closely to despotic " rule than to any other attribute of government.'

" 3. This statute is discriminating and class legisla- " tion, in violation of the spirit of our Constitution, and " contrary to the principles of civil liberty and natural " justice. It gives to a certain class of citizens privi- " leges and advantages which are denied to all others in " the State, under like circumstances, and subjects one " class to losses, damages, suits, or actions from which all " others, under like circumstances are exempted. (*Holden* v. *James*, 11 Mass. 396.) Its operation is restricted and " partial to that part of Rock River within the County " of Rock, while said river elsewhere and all other rivers " are excluded. * * * It gives to such favored classes " the stupendous advantage and exceptional privilege of " maintaining such actions without proof that any injury

" or danger has been, or will be, caused by reason of " such act. It would be difficult, if not impossible, to " to crowd into so short a statute any more or greater " violations of that principle, so essential to a free gov- " ernment of equal, general and standing laws. For " these reasons, this statute is unconstitutional and void. " It is, perhaps, not a violation of any special clause of " the Constitution in these respects, but it is a violation " of its essential spirit, purpose and intent, and contrary " to public justice." (Authorities.) " In this connec- " tion I cannot forbear quoting the language of Mr. " Justice Chase in *Calder* v. *Bull*, 3 Dall. 387–8: 'I can- " not subscribe to the omnipotence of a State Legislature, " or that it is absolute and without control, although its au- " thority should not be expressly restrained by the Con- " stitution or fundamental law of the State. The nature " and ends of the legislative power will limit the exercise " of it. There are certain vital principles in our free " republican government which will determine and over- " rule an apparent and flagrant abuse of legislative " power, as to authorize manifest injustice by positive " law, or to take away that security of personal liberty " or private property for the protection whereof the gov- " ernment was established. An Act of the Legislature " (for I cannot call it law), contrary to the first great " principles of the social compact, cannot be considered " a rightful exercise of legislature authority." " This " language is quoted in the above case of *Durky* v. *The* " *City of Janesville*, but it will bear repetition here, as " more apt and appropriate in that case. It has been " suggested that this statute was procured for this case

" and perhaps, like cases in the City of Janesville, as if, " when the courts deny an injunction, the Legislature " is made to intervene and enact that an injunction shall " be granted, and that, too, without proof of injury or " danger. It is hard to believe that any one would pro- " cure the passage of such an Act or any Act of the " Legislature to circumvent and overrule the courts in " cases which have failed for want of any proof of in- " jury. This Act is sought to be sustained as a proper " exercise of the police power of the State. The Act " itself makes no such claim, and has not the remotest " reference to any such object or purpose. It is suffi- " cient to say that such an objectionable statute cannot " be sustained by the exercise of any power inherent in " or conferred upon the Legislature. The complaint " states no cause of action, and therefore the Circuit " Court ought to have sustained the motion to dissolve " the injunction."

The clause of this opinion which recites that this statute may have been passed because the courts had already denied an injunction in the same cases, because no injury could be shown, is remarkably pertinent in the case at bar, in which the respondent has pleaded a former judgment, determining in the same court, between the same parties, that the respondent's methods of mining neither do, nor threaten injury, and that its mining operations are still carried on in the same manner that they were being carried on at the times involved in the former suit between the same parties.

We do not ask that the Act as an Act be declared

unconstitutional, because if correctly interpreted, we believe it to be constitutional.

But we ask that a rule of construction be applied to it, that, as between two possible constructions, the courts will give that interpretation which renders a statute constitutional as against an interpretation that would render it unconstitutional. That it will give an interpretation which does not overthrow recognized property rights, that is not against natural right, and that is not destructive of the fundamental principles of free, equal and enlightened civil government.

We contend that the construction contended for by complainant would be in direct conflict with these rules, and that the construction contended for by us would be in harmony with them.

In the Circuit Court, counsel for the complainant presented certain authorities to support their contention that the Caminetti Act justifies an injunction without injury. We submit a brief statement of the questions involved in those cases, asking the Court to bear in mind that our contention is, that said Act nowhere seeks to interfere with, nor could lawfully interfere with, mining, except so far as the same injures or threatens to injure the navigation or navigability of the navigable waters.

The cases, *Gloucester Ferry Co.* v. *Penn*, and *Mobile Co.* v. *Kimball* (cited and quoted from in complainant's brief) have no pertinency; the former decided, substantially, that the States have no power to tax interstate commerce; and the latter decides that a State may lawfully expend money in the improvement of navigable

water-ways within its limits, provided such improvements are not prohibited by Congress.

If counsel's contention is correct, then we reply that Congress has (in the Act under consideration) decided what constitutes an injury, or violation of the national rights, in unmistakable terms, where it says, in Section 22: "And any persons, etc., who shall mine by the hydraulic process, directly or indirectly injuring the navigable waters of the United States, in violation of the provisions of this Act, shall be guilty, etc., and punished," etc.

Will a law be construed to interdict the pursuit of a legitimate productive industry in an entirely harmless manner, unless such law in plain terms, interdicts, or prohibits it? Can a court inject language into the belly of an Act of Congress to sustain a contention that a legitimate industry, pursued in an innocuous manner, should be enjoined?

We feel compelled to challenge the contention of complainant's counsel that, under the River and Harbor Bill of 1890, "power is given the Secretary of War "to absolutely determine what contemplated improve- "ments, or structures, over these waters are, or are not, "obstructions to said waters."

What the Act really does, is to provide that no bridges shall be constructed over navigable waters, or structures extended into navigable waters outside of established harbor lines, without the approval of the Secretary of War.

The power to determine "what may be constructed" is a very different thing from the power to determine "what

constitutes an obstruction." The former is an executive act, the latter a judicial determination.

The case of *Newport and Cincinnati Bridge Co.* v. *U. S.*, 15 Otto, p. 470, decides but two important propositions.

Before Congress had passed any general law with regard to bridges across navigable waters (in other words, whilst that power of Congress was in a dormant state), under authority from the State Legislatures of Ohio and Kentucky, the Bridge Co. built a bridge across the Ohio River. There was a special statute of the U. S., granting the right to build a bridge, with a clear space for vessels of certain height and width. Congress also passed a resolution authorizing the bridge. Before the bridge was completed Congress passed another Act, that the clear space should be 100 feet high and 100 feet wider, and authorizing the Bridge Company to sue in the Court of Claims to have it determined what, if any, liability there was on the part of the U. S. to pay for the effect of the change in the law. The Court decided that the action of the States could not control or restrict the action of Congress; that the former right was a mere license, revocable by Congress, and that the U. S. had incurred no liability by the change in the law. That, as the bridge was a bridge over a navigable stream, solely for the purpose of interstate commerce, Congress had entire jurisdiction as to the bridge, whenever it chose to exercise it. Judge Field dissented, thinking the doctrine too harsh.

In *Penn* v. *Wheeling & Belmont Bridge Co.*, 18 Howard, 421, a bridge built without any authority from Con-

gress had been decreed by the U. S. Court to be an obstruction to commerce. Thereafter Congress passed an Act authorizing the maintenance of the bridge, and making it a Postroad (it was an interstate bridge between Ohio and Virginia) for the passage of U. S. mails. The Court held that thereby the bridge became a lawful structure. In other words, that Congress has power to authorize obstructions of a navigable stream.

But in this opinion occurs the following language, very significant in the case at bar (see pp. 431–2): "A class of "cases that have frequently occurred in the State courts "contain principals analogous to those involved in the "present case. The purely internal streams of a State" (as is the Sacramento River) "which are navigable, be- "long to the riparian owners to the thread of the stream, "and, as such, they have a right to use the waters and "bed beneath for their own private emolument, subject "only to the public right of navigation. They may con- "struct wharves or dams or canals, for the purpose of "subjecting the stream to the various uses to which it "may be applied, *subject to this public easement.* But if "these structures materially interfere with the public "right, the obstruction may be removed or abated as a "public nuisance."

The cases cited on behalf of complainant where three different States had passed laws regulating the floating, running and booming of logs in their respective navigable streams, require but brief notice. Every one at all familiar with the floating, running and booming of logs in rapid streams, cannot fail to know how dangerous it is to shipping, especially to the smaller water craft, when

the logs are not properly managed, handled and controlled. Under such circumstances, they become even more serious than a mere obstruction to navigation.

The Pennsylvania case was upon a State statute, which provided (see 65 Pa. State, p. 402): "Sec. 2. It shall "not be lawful for any person * * * to float * * * "down the Susquehanna River, between the town of "Northumberland and the line of the State of Mary-"land, any saw-logs, without the same being rafted and "joined together or enclosed in boats, and under the "control, supervision and pilotage of men, especially "placed in charge of the same and actually thereon."

To any one who has seen log drives, and who is familiar with the current and channels of that portion of the beautiful and picturesque Susquehanna, involved in this legislation, and the vast number of small craft plying upon it constantly, when it is open to navigation, this legislation and its propriety, merely as a police measure, cannot fail to sufficiently appeal.

In *Texarcana & Fort Scott Ry. Co.* v. *Parsons*, 74 Fed. Rep., p. 408, Parsons sued the Railway Co. to recover damages tor his shipping on Red River, being prevented from passing up and down Red River at the place where the Railway Co.'s bridge crosses Red River from Arkansas to Texas, such detention being caused by driftwood lodging against the bridge. This bridge was constructed after the passage of the Act of Congress of May 1, 1888, (25 Stats. at Large, 105–7), which was the first General Statute of Congress with regard to the construction of bridges over navigable streams. The only defense offered was that the bridge

was not a legal cause for action for damages, claiming it had been built in compliance with the Act of Congress. The trial showed that the bridge did not comply with the Act of Congress; that the spans were narrower, and lower than the Act required; that the piers in the stream were not in line with the course of the stream, that the bridge was not at right angles to the course of the stream, and that the variance from the requirements of the Act had never been approved by the Secretary of War.

Opinion: "The rules of law applicable to this case are "well settled. Every citizen has a right to the free "navigation of the public waters of the United States; "any interruption or obstruction of this free use by any "kind of structure, is *prima facie*, a nuisance. But the "power of Congress to regulate commerce among the "States comprehends the control, *for that purpose, and* "*to the extent necessary*, of all the navigable waters of "the United States, and the railroads engaged in inter-"state commerce. Interstate commerce by rail has "grown to be more extensive and important than "that carried on upon the navigable rivers of the coun-"try. To promote and facilitate the commerce by rail, "which has to cross navigable streams, it has become "common for Congress to authorize the construction "of bridges over the navigable rivers of the United "States. Congress has the power to determine the loca-"tion, plan, and mode of construction of such bridges; "and a bridge constructed over a navigable river in ac-"cordance with the requirements of the Act of Con-"gress is a lawful structure, however much it may inter-

" fere with the public right of navigation." (Authorities.)

" It is equally well settled by the authorities we have " cited, that those who seek to justify the erection or " maintenance of a bridge across a navigable river, which " obstructs its navigation, upon the ground that Congress " authorized its erection and maintenance, must show " that it was constructed and is maintained in accordance " with the requirements of the Act of Congress." Then the Court, after stating the variance between the bridge as constructed and as required by the law, says: " The " bridge varies in its construction in a material respect " from the requirements of the Act of Congress, and is " therefore an unauthorized and unlawful structure. The " variation is material and substantial, and robs the " structure of the protection of the statute."

* * * " The only question was whether the bridge, " taken as a whole, was the proximate cause of stopping " the plaintiff's boats. The defendant did not contend " that the bridge was not an obstruction to the navigation " of the river, but only that Congress had authorized the " obstruction. This would have been a complete defense " if proved; but it was not proved, and no evidence was " offered tending to prove it.

" On the subject of damages, the Court told the jury " that, if they found the defendant responsible for the " detention of the boat, 'the plaintiff would be entitled " to recover his actual damages.' "

We can hardly see how an action at law for actual damages, is authority for the contention that an injunc-

tion should be issued in a case where there is no injury, actual or threatened.

In the case of *Vanderhurst* v. *Tholcke* (113 Cal. Sup. Ct., p. 147), the facts were: That in Salinas City, there were growing in a public street (the title to which in fee was vested in the City of Salinas) certain shade trees. That the City Council, in the exercise of its supervision of the streets, passed an order to cut down and remove the trees which were growing in said street in front of plaintiff Vanderhurst's premises. Vanderhurst sued out a writ of injunction, which the Supreme Court of California dissolved, on the ground that, under the charter of the city, they were clearly acting within their powers and duties.

Point II.

That in no case will a court enjoin the conduct of a lawful business, so long as the same is so conducted as neither to do nor threaten any injury whatever.

Bearing in mind that in this case the pleadings show that the respondent's operations neither do nor threaten any injury to navigation or any navigable waters, or to any lands adjacent to any navigable waters, we submit: that injunction is a special equitable relief, granted only to prevent injuries, actual or threatened; and that beyond this, courts of equity have never gone, and on principle never ought to go; that the courts have uniformly held to these doctrines, with the added requirement, that to justify the injunction, such injuries must be irreparable.

1st High on Injunctions, Sec. 20, (2d edition):

"The subject matter of the jurisdiction of equity "being the protection of private property and of civil "rights, courts of equity will not interfere for the pun- "ishment or prevention of merely criminal or immoral "acts, unconnected with violations of private right. "Equity has no jurisdiction to restrain the commission of "crimes, or to enforce moral obligations and the perform- "ance of moral duties; *nor will it interfere for the pre- "vention of an illegal act, merely because it is illegal;* and "in the absence of any injury to property rights, it will "not lend its aid by injunction, to restrain the violation "of public or penal statutes, or the commission of "immoral and illegal acts."

Same, Section 760:

"The unauthorized erection of a pier in a public har- "bor is a purpresture which will be restrained by "injuction at the suit of the Attorney-General. And "such an erection will be regarded as a nuisance *per se*, "and will be enjoined without evidence to show that it "would, if erected, be a nuisance in fact. So the ob- "struction of a navigable river, by a wharf-owner driv- "ing piles into the bed of a river and extending his "wharf so as to occupy a space of three feet, out of a "width of sixty feet available for navigation may be "enjoined. But where it clearly appears that the "erection of a pier or wharf in tidal waters, and upon "soil thereunder, belonging to the State, would not "constitute a public nuisance, and would not prove "injurious to the harbor or to the people of the State, an "injunction should not be allowed. Where, however,

" the structure proposed would hinder navigation, it " will not avail defendant to urge that the benefit to the " public counterbalances the inconvenience. But to " warrant an injunction against an alleged purpresture " or public nuisance it must clearly appear that it is " such in fact; and if it be doubtful whether there is a " purpresture the relief will be withheld. It is held " that in cases of doubt the question as to the existence " of the nuisance should be determined by a jury before " granting the injunction. But any unauthorized appro- " priation of public property to private uses, amounting " to a purpresture or public nuisance, is within the juris- " diction of equity to enjoin."

Perhaps there is no clearer statement of the matter anywhere than in the opening paragraph of Kerr on Injunctions, p. 1:

" The jurisdiction of the high court of justice, by way " of injunction, is an equitable jurisdiction, and is ex- " ercised upon equitable principles. The subject mat- " ter of the jurisdiction of a court of equity is civil " property. A court of equity is conversant only with " questions of property and the maintenance of civil " rights. *Injury to property, whether actual or prospec-* " *tive, is the foundation on which its jurisdiction rests.* " A court of equity has no jurisdiction in matters merely " criminal, or merely immoral, which do not affect any " right to property. If a charge be of a criminal nature, " or an offence against the public peace, and does not " touch the enjoyment of property, jurisdiction cannot " be entertained. The court has no jurisdiction to re- " strain or prevent crime, or to enforce the performance

" of a moral duty, except so far as the same is concerned " with rights to property. * * * An injunction, " therefore, cannot be had to restrain the publication of " libel, or proceedings in a criminal matter. But if an " act which is criminal touches also the enjoyment of " property, the court has jurisdiction, *but its interference* " *is founded solely upon the ground of injury to prop-* " *erty.*"

In *Truly* v. *Manzer*, 5 Howard (U. S.) p. 142–3, the U. S. Supreme Court says: " There is no power, the " exercise of which is more delicate, which requires " greater caution, deliberation and sound discretion, or " more dangerous in a doubtful case, than the issuing of " an injunction. It is the strong arm of equity, that " never ought to be extended, unless to cases of great in- " jury, where courts of law cannot afford an adequate " and commensurate remedy in damages. The right " must be clear, the injury impending and threatened so " as to be averted only by the protecting, preventive " process of injunction."

2 Black (U. S.), p. 545; *Parker* v. *Winne-pesseagu, etc.*

" If the evidence of injury is conflicting, so that the " injury is doubtful, injunction will not be granted."

The public cannot obtain an injunction for a private injury, and a private individual cannot obtain an injunction for a public injury, unless the complainant sustains special injury.

If the prayer of the bill in this action is to be taken as indicative of the theory upon which the bill was framed, it was contended by the complainant, The United States, that an injunction of this Court would lie against the defendant, to prevent its hydraulic mining operations in the district covered by the Caminetti Act, merely for the failure of the said defendant corporation to obtain the permit of the Debris Committee, mentioned and referred to in Sec. 9 of said Act; and such an injunction was sought by the said bill. The prayer is for such restraint "until they the said respondents or either of them in behalf of both shall make, present and file with said California Debris Commission their said verified petition setting forth such facts as will comply with the said law, etc., accompanied by said deed or instrument duly executed and acknowledged by the law of said State of California, whereby the said North Bloomfield Mining Co., as aforesaid, surrenders to the United States the right and privilege to regulate by law, etc., etc."

No injury to navigation is directly alleged by the complainant in the bill, and on the argument of the demurrer to the bill before His Honor Judge McKenna, it was frankly stated by the United States Attorney who prepared and defended the bill, that he had sought to exclude all claim of such injury from its allegations, in order that its sufficiency might be tested by general demurrer, upon considerations entirely aside from injury to navigation, so that it might be explicitly determined whether, under the provisions of the Caminetti Act, the respondent could carry on its business, without obtaining a permit from the Debris Commission and making and executing the deed

of Surrender and Cession mentioned and referred to in Sec. 10 of said Act.

From the peculiar method adopted in the bill, for the definition and description of hydraulic mining, his Honor Judge McKenna, who heard the demurrer, thought that perhaps an inference relative to injury to the navigable waters might be drawn therefrom, and therefore overruled respondent's demurrer to the bill, in order that the question might be definitely and clearly presented in some other form; whereupon respondent interposed his answer, by which it was admitted that the defendant corporation was engaged in hydraulic mining in the district referred to by the bill, without filing a petition for a permit, or executing a deed of cession or surrender to the United States, of the right or privilege to regulate the manner of restraint of debris resulting from their hydraulic operations, and the amount of debris to be produced therefrom; but the answer denied the deposit of debris in such place and manner as to interfere with or obstruct navigable waters, and affirmatively alleged that all debris resulting from its hydraulic operations was now effectively impounded and restrained by defendant so as not to do injury to the rights of the plaintiff.

The only relief sought by the bill is that of injunction, and there is no allegation upon which a judgment or decree for damages in any amount can be predicated. To this answer the complainant interposes a general demurrer and exceptions to the sufficiency of the answer, which give rise to the questions now before the Court. These questions naturally divide as follows: 1. Do the terms of the Act require the defendant corporation to file with

the Debris Commission, a petition for a permit to mine by the hydraulic process and to execute a deed, surrendering to the United States, the right to regulate the manner of impounding and restraining debris and the amount to be produced. 2. If so will equity interpose by injunction to enforce the Act.

(a) *The Act leaves it to the option of the hydraulic miner to obtain the permit and make the surrender of rights, or not. If he files the petition and makes the cession or surrender he is entitled to the protection of the Act and the benefits extended by its terms. If he omits or neglects to make the filing and surrender, he may be prosecuted for injuring and obstructing navigable waters, and would be liable for such damage and injury under every method of judicial process and procedure which would have been applicable in the absence of this Act of Congress.*

The complainant's contention, is, pure and simple, that the general government has power to single out a particular industry of the state and, under pretense of a regulation of commerce, prohibit its further existence. None of the authorities cited or referred to by complainant's counsel, support such a proposition. These cases are valuable only as instances and illustrations of what are considered police powers of the several states, and the power of Congress to regulate commerce; and instances of conflict of these powers. No instance has been or can be cited, where it has been held that Congress has the power to entirely suppress any particular single business within the limits of a state. Under its powers of taxation a license tax may be imposed by Congress upon certain business. Means of collecting the tax and enforcing its payment,

and punishment for violations of the law imposing it, are provided; but no attempt has ever been made by Congress to provide a "complete scheme" for the regulation of the business, or for its prohibition, and it is believed that no instance can be found, where the general government brought suit in equity to obtain an injunction by which to entirely suppress or suspend any calling or business in itself lawful. It is settled that a state, under its police powers, may under certain conditions, regulate and even prohibit a business from being carried on within its limits; and this, for the public good; but such power has never yet been affirmed to the national government to interfere, upon any grounds, to this extent, with state affairs.

It is not denied that Congress has full power to regulate commerce; that this power extends to foreign commerce, and internal commerce in its relations to the navigable waters of the State; that as to foreign commerce, the power of Congress is exclusive; that as to the commerce upon internal navigable waters, it is concurrent with that of the state, but when asserted and in conflict with a state regulation, the regulation of Congress is paramount. To this extent, and no further, do the authorities cited by complainant go. If the contention, however, of complainant's counsel is correct, that the present Act is mandatory in its requirements upon hydraulic miners, then it is certain that Congress has made an unconstitutional invasion upon the rights of this state to regulate its own affairs, and has even gone further than the state itself could do under its own constitution; for such law would be distinctly special and unjustly discriminating legislation, since it would apply only to the

hydraulic miner, and there is no reason why a miner by this process should be regulated or prohibited from obstructing or injuring navigation, while miners by any other process, or farmers, and all other persons, should be permitted to do so.

The state itself has not seen fit, under its police or any other power, to make any regulation upon this subject.

But the Act itself bears inherent evidence that Congress intended that a hydraulic miner should exercise *the option* whether to avail himself of the Act, or not. Sec. 10 (27 U. S. Stats. 9) provides as follows:—

" That said petition shall be accompanied by an instru-
" ment duly executed and acknowledged, as required by
" the law of the said state, whereby the owner or owners
" of such mine or mines surrender to the United States
" the right and privilege to regulate by law, as provided
" in this Act, or any law that may hereafter be enacted,
" or by such rules and regulations as may be prescribed
" by virtue thereof, the manner and method in which the
" debris resulting from the working of said mine or mines
" shall be restrained, and what amount shall be produced
" therefrom; it being understood that the surrender afore-
" said shall not be construed as in any way affecting the
" right of such owner or owners to operate said mine or
" mines by any other process or method now in use in
" said state; provided, that they shall not interfere with
" the navigability of the aforesaid rivers."

If this section is mandatory it is thoroughly unconstitutional, as it requires the miner to surrender his right to the use and enjoyment of his mine and the right to

conduct his business and mining operations in his own way not detrimental to the rights of others. If he must surrender this, under the behest of law, he must be afforded just compensation; all this upon elementary principles and upon authorities too numerous for mention here.

But the section above quoted indicates that Congress was unwilling to assume the power to promulgate this scheme for the regulation of hydraulic mining, and for its prohibition because of non-compliance with such regulation, unless the hydraulic miner should voluntarily submit and consent to the exercise of such power, by the formality of execution of a deed for that purpose; the very language itself of the section implies that without such deed or transfer, the right to regulate the manner of the restraint of debris, and the amount produced from mining operations, remained with the owner of the mine; and the unconstitutional purpose of Congress to compel a transfer of the property of the miner to the government will not be presumed; but on the contrary, in construing a statute, such import will be given to it as will allow it to stand every constitutional test. This effect is attained by holding, with the respondent, that the requirements of Secs. 9 and 10 of the Caminetti Act, are directory and permissive rather than mandatory, and this view is supported by the fact that the Act itself provides a penalty for a violation of the terms of the Act, only when such violation is accompanied by or involves injury to the navigable waters, and from the further fact that by section 3 of said Act it is declared:—

"That hydraulic mining as defined in Sec. 8 hereof

directly or indirectly injuring the navigability of said river systems, carried on in said territory, other than as permitted under the provisions of this Act, is hereby prohibited and declared unlawful."

The language last above quoted deserves careful attention. Hydraulic mining "directly or indirectly injuring the navigability, etc.," is hereby prohibited and declared unlawful. Nothing can be clearer than this language, to the effect that the unlawful act, the act prohibited, is the injury to the navigable streams. The mining operations without filing a petition for a permit, or without making a deed of surrender, were not declared unlawful and were not prohibited; on the contrary, upon the familiar principle and doctrine of *unius inclusio alterius exclusio*, the Act left hydraulic mining without injury to navigable streams exactly where it stood before the passage of the Act.

(b) *Equity will not interfere by injunction where there is other adequate relief or unless there is irreparable injury to property rights.*

If it is assumed for the sake of argument that the provisions of this Act are mandatory and require compliance by all hydraulic miners in said district, and even declares such mining, with or without injury to the navigable waters, to be unlawful and prohibits the same, it would by no means follow that an injunction would lie against such mining, carried on contrary to the terms of the Act.

The Act itself contains certain provisions relative to the enforcement thereof. Sec. 19 of said Act among other things provides:—

" Said Commission shall take necessary steps to enforce " its orders in case of the failure, neglect, or refusal of " such owner or owners, company or corporation, or " agents thereof, to comply therewith, or in the event of " any person or persons, company or corporation, working " by such process in said territory contrary to law."

The only order which the Commissioners are authorized to make is an order:—

" Directing the methods and specifying in detail the " manner in which operations shall proceed in such mine " or mines; what restraining or impounding works, if " facilities therefor can be found, shall be built and main- " tained; how and of what material; where to be located; " and in general set forth such further requirements and " safeguards as will protect the public interests and pre- " vent injury to the said navigable rivers, and the lands " adjacent thereto, with such further conditions and " limitations as will observe all the provisions of this Act " in relation to the working thereof and the payment of " taxes on the gross proceeds, etc." (Sec. 13–27 U. S., 508–509.)

This order is to be made after the hearing of the petition, and this is the only order which the Commission can make to be enforced. The only method of enforcement provided by the Act is by the prosecution of the offenders in a criminal proceeding, and there is good authority for the assertion that the complainant is restricted to the terms of the Act for its enforcement.

Drainage Commissioners of *Sidell and Vance* v. *Sconce et al.*, 38 Ill. App. R., 120.

Under the Drainage Act of 1879 Commissioners had jurisdiction of the ditches in their district, and were compelled to keep the drains in good order, and Commissioners brought suit by a bill in chancery to restrain the defendants from permitting their livestock to pasture upon the lands within the system, to the injury of ditch No. 4. The law provides:—

"That wherever the owner or occupant of land in a "drainage district shall permit animals to pasture in an "enclosed field through which runs an open ditch, said "owner or occupant shall repair such damage to the ditch "as may be done by the animals, and if he neglects to do "so the Commissioner may make the repairs and require "the owner or occupant to pay the amount of the same to "the treasury of the district, and in case of omission to "do so, then the Commission may proceed to collect by "suit at law, etc."

The Court held that the complainants were confined to their remedy at law, and denied the relief.

It is not my aim to add to what has been said by Mr. Cross in his brief as to the necessity of showing irreparable injury as a condition precedent to equitable interference by the Court, except as the question may be involved in points hereafter discussed.

(c) *A court of equity will not interfere by injunction to restrain an act which does not affect property rights injuriously, or merely because such act is unlawful and is prohibited by law.*

The statement of complainant's counsel of our position upon this point is not correct. They say:—

"The defendant's counsel claim in the argument that " the injunction would not lie because the acts complained " of constituted a criminal offense, and the only remedy " was a criminal prosecution."

While it is suggested as in the point last above that the complainant is confined to the only mode of enforcement prescribed by the Caminetti Act, which was criminal prosecution for obstructing and injuring the navigable waters, this by no means states our position. We assert that equity will not restrain an act merely because it is forbidden by law; not that equity will not restrain an act because it has been made a criminal act. An act may be both criminal and subject to penalty by prosecution, and may also at the same time be the cause of irreparable injury to property rights and subject to the injunctive interference of a court of equity.

In re Debs, 158 U. S., 564, page 593.

In this case the petitioner Debs was imprisoned for contempt of court by violating an injunction restraining obstructions to United States mails and interstate commerce. It was contended by the petitioner that the Court had not the power to issue the injunction. It was held that the United States mails were property of the United States. That the obstruction of commerce between states was an injury to the property of individuals such as to warrant equitable interference; but there were direct allegations of obstruction both of the mails and of the interstate commerce. As stated by the learned Justice (page 592):—

"That the bill filed in this case alleged special facts,

calling for the exercise of all the powers of the Court, is not open to question. The picture drawn in it of the vast interests involved, not merely of the City of Chicago and the State of Illinois, but of all the states, and the general confusion into which the interstate commerce of the country was thrown; the forcible interference with that commerce; the attempted exercise by individuals of power belonging only to government, and the threatened continuance of such invasions of public right, presented a condition of affairs which called for the fullest exercise of all of the powers of the Court. If ever there was a special exigency, one which demanded that the Court should do all that Courts can do, it was disclosed by this bill, and we need not turn to the public history of the day, which only reaffirms with clearest emphasis all its allegations."

If it had appeared in the Debs case that no act of the petitioner threatened injury to the mails or the interstate commerce, is there any doubt as to what would have been the decision of the Court under such conditions?

Turn if you please to the allegations of the present bill, and the issue tendered by the answer. Is there any allegation of any injury direct or indirect to the navigable waters or to the commerce of the country? The allegations are that the respondents have failed and are refusing to file two documents with the Debris Commission. Throughout his opinion in the case above referred to Justice Brewer was careful to uphold the general rule that it is outside of the jurisdiction of a court of equity to enjoin the commission of a crime (p. 593); and that as a general rule equity will not interfere where the object sought can be otherwise well attained. He says:—

"This as a general proposition is unquestioned. A chancellor has no criminal jurisdiction; something more than the threatened commission of an offence against the laws of the land is necessary to call into exercise the injunctive powers of the Court. *There must be some interference, actual or threatened, with property or rights of a pecuniary nature,* but when such interferences appear, the jurisdiction of the court of equity arises and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law."

The authorities upholding our contention are numerous, but before citing or commenting upon them, it is proper to briefly refer to the claim of counsel for complainant that they are not applicable to the present case. Why not applicable? An injunction is asked. The act complained of is alleged to be a violation of law; no injury to property rights is alleged by the bill, and it is distinctively and affirmatively alleged by the answer that no injury to property rights is committed.

No other grounds for equitable relief are suggested than that the act complained of and threatened is one prohibited by law.

If the allegations of the bill as to the requirements of the Caminetti Act were stricken out, nothing would be left of the complainant's case; and it falls strictly within the category of cases in which equitable injunctive interference is sought, to prohibit an alleged unlawful act, merely because it is an unlawful act and is prohibited by law.

(In passing it is proper to say that the United States, when it enters the field of litigation, is bound by the

same rules as private parties. *People* v. *Canal Board*, 55 N. Y. 397.)

The principle now invoked is supported by the following authorities:—

1 High on Injunctions, Secs. 20–760–761;
Attorney General v. *Utica Ins. Co.*, 2 Johns. Ch. 371.

The last case cited above is an early but leading case. The Attorney General asked for an injunction to restrain the defendant corporation from carrying on a banking business in violation of an Act of the Legislature of New York of April 6, 1813.

In this case it was admitted that the act complained of violated the statute, but questioned whether such violation could be punished as an offence.

In the opinion of the Chancellor, the Court says:—

"If the charge be of a criminal nature, or an offense "against the public, and does not touch the enjoyment "of property, it ought not to be brought within the "direct jurisdiction of this Court, which was intended to "deal only in matters of civil right, resting in equity, "or where the remedy at law was not sufficiently ade-"quate. Nor ought the process of injunction to be "applied, but with the utmost caution. It is the strong "arm of the Court; and to render its operation benign "and useful, it must be exercised with great discretion "and when necessity requires it. Assuming the charges "of the information to be true, it does not appear to me "that the banking power, in this case produces such "imminent or great mischief to the community as to call "for this summary remedy. The English Court of Chan-

" cery rarely uses this process, except when the right is " first established at law, or the exigencies of the case " render it indispensable. Thus in Brown's case, in 2 " Vesey, 414, a motion was made for an injunction to " stay the use of a market, and Lord Hardwick said, it " was a most extraordinary attempt, and that the plain- " tiff had several remedies which he might use. * * * " So he observed in another case that the Court granted " an injunction to stay the working of a colliery with " great reluctance, and will not do it, except where there " is a breach of an express covenant, or an uncontroverted " mischief. In a late case, before Lord Eldon (*Attorney* " *General* v. *Nichol*, 16 Vesey, 338), on an information " filed to restrain the defendant from obstructing the an- " cient lights of a hospital, he stated that the foundation " of this jurisdiction, by injunction, was that head of mis- " chief, or those mischievous consequences, which re- " quired a power to prevent, as well as to remedy, and " that there might be nuisances which would support an " action, but which would not support an injunction.

" If the defendants are carrying on banking operations " contrary to law, they ought undoubtedly to be re- " strained; but I cannot be of opinion that the operation " is such a mischief or public nuisance as to require the " necessity or extraordinary process of this Court to " abate it. I know that the Court is in the practice of " restraining private nuisances to property and of quieting " persons in the enjoyment of private rights, but it is an " extremely rare case, and may be considered, if it ever " happened, as an anomaly, for a court of equity to inter- " fere at all, and much less preliminarily, by injunction, to

" put down a public nuisance which did not violate the " right of property but only controvened the general " policy. * * * There are no particular individuals " affected or disturbed in the enjoyment of their private " rights by the banking power assumed in this case. " * * * Here is no encroachment on the property " of the state nor is the mischief of a similar nature. " The objection to the exercise of the banking power in " this case is, that it is unlawful, or not warranted by " law. It would be quite extravagant to hold it to be a " public nuisance, or that kind of annoyance and mischief " which a nuisance implies. The information is founded " on the charge, that the banking power exercised by the " defendants is not given by their charter, and that it is " an offense against the statute. There is no case in " which the information has been sustained in this Court " on such grounds."

In *Sparhawk* v. *Union Passenger Railway Co.*, 54 Pa. St. 402, 420, 423, and 424, and in *Kenton* v. *The Union Passenger Railway Co.* (both cases included in the same opinion), it was held that the running of the cars on the Sabbath day to the disturbance of members of a church and in violation of the laws of the Commonwealth, could not be restrained by injunction. The injunctions were granted by the *nisi prius* court, but were vacated and set aside by the Supreme Court of the state. The suits were brought by private persons. The Court held that, so far as the injury complained of was concerned, it was not a private injury but a public one, and as such not of a character to warrant the interference of equity, and upon this subject the Court says at page 423 of the opinion:—

" It seems to me that this is clearly but a charge of " the violation of the provisions of the Act of Assembly " of 1794 which interdicts worldly employment on the " Sabbath day, and that it describes nothing but the " consequences which were intended to be prevented " by that Act. If this be so, then it is not a case of " special injury, but only that which results from a public " offence or wrong to all, and everyone in the community " alike where the act is committed. It is not possible, I " think, to discover the connection between the cause of " complaint and a private injury, excepting in and through " the act as prohibited by the statute. And if we are to " regard it as a common law offence, the charge in the " bill does no more than describe the fruits of the offence. " Rest and quiet on the Sabbath day, with the right and " privilege of public or private worship, undisturbed by " any merely worldly employment, are exactly what the " statute was passed to protect. (10 Can. 398.) The " deprivation of the privileges is the sum of the com- " plaint, and this bill is essentially, therefore, a bill to " enforce by injunction a penal statute. That is not our " province, especially at the suit of a private party. If " it be supposed that because an act is illegal merely, " equity will interfere to restrain it, it is a misapprehen- " sion of equity jurisdiction. ' If an act be illegal,' said " Vice Chancellor Kindersley, in *Solteau* v. *De Hall*, 2 " Sim. 153, ' I am not to grant an injunction to restrain " ' an illegal act merely because it is illegal. I could not " ' grant an injunction to restrain a man from smuggling, " ' which is an illegal act.' Nor could he for any merely " criminal or penal offence. It is not impossible to con-

" struct a plausible argument on the theory that a viola-
" tion of the law is, without more, a special injury, but
" such an injury would be too shadowy to be the founda-
" tion for equitable interference; and besides the penal
" law is the remedy in such a case to redress it, and
" equity does not interfere."

In *Babcock* v. *New Jersey Stockyard Co.*, 5 C. E. Green (20 N. J. Eq. R. 296), it appears that Babcock, a private person, had brought an action to prevent the defendant from carrying on the slaughter-house business, from private injury and interference with complainant's private rights. A preliminary question was raised whether the defendant corporation was subject to the provisions of an Act of the Legislature prohibiting the carrying on of offensive trades in Hudson County. Upon this question the Court says:—

" This, although it was fully argued, and with great
" ability, by counsel on both sides, I will not determine
" here for two reasons: First, because it is a question of
" law which may be considered doubtful, or that is at
" least in good faith disputed and should be adjudicated
" by the courts of law of this state, and therefore this
" Court must not grant the preliminary injunction founded
" upon that statute. Secondly, and chiefly, because if
" that statute was in force against the operations of this
" Company, it would simply render the manufacture of
" offal and animal remains unlawful; but this Court
" could not enjoin it any more than it could the selling of
" liquor by the small measure without a license, or other
" unlawful acts simply because unlawful, unless it caused

" irreparable injury, for which there was no redress at " law. I have no hesitation in holding, that it was not " disputed by counsel for the defendants that this char- " ter does not empower the defendants to carry on the " business authorized, in a way that would be injurious " to others, or that would materially affect their health, " their comfort or their property."

The injunction was granted purely on the grounds of interference with private property rights.

In the *Emperor of Austria* v. *Day and Kossuth*, 3 Degex, Fisher & Jones, 217, "the defendant Kossuth, a " Hungarian refugee, caused to be manufactured in Eng- " land a large quantity of notes, which though not made " in imitation of notes circulated in Hungary, purported " to be receivable as money in any Hungarian state or " pay office, and to be guaranteed by the state of Hun- " gary. The plaintiff, King of Hungary, sued to have " these notes delivered up and to restrain their manu- " facture, alleging that the issuance of said notes would " injure the rights of the plaintiff by promoting revolu- " tion and disorder, and would injure the state by the " introduction of a spurious circulation, and would thereby " also injure the plaintiff's subject."

The Court held that while it had no power to restrain the commission of acts violating political principles of a foreign sovereign, the injunction should be granted strictly upon the theory that the acts complained of were a violation of property rights.

In the case of *Smith* v. *Lockwood* (13 Barb. 214), the complainants, journeymen sawmakers of the City of New

York, brought suit to restrain within statutory limits the manufacture of saws in the state prison at Sing Sing. The complaint alleged a violation by the defendant of an act of the legislature prohibiting the employment of convict labor under certain conditions, and the Court held that the wrong complained of was a public one and that an injunction would not lie, and in this connection Justice Strong, delivering the opinion of the Court, said:—

"It has been supposed, however (and I see that the "supposition has received the sanction of one of my "brethren for whom I entertain the highest respect), "that the allegations in the complaint would, if proved, "present a proper case for the interposition of this Court "by way of injunction. Injunctions are never granted to "prevent the perpetration or the continuance of a public "wrong (not leading to the special injury of individuals) "unless it constitutes a nuisance imminently dangerous "to the public or some considerable portion of it. In the "*Attorney General* v. *The Utica Insurance Co.* (2 John "Ch. Rep. 378) Chancellor Kent decided that a court "of equity had no jurisdiction of an offence against a "public statute. He said very truly that the powers of "injunction should be applied with the utmost caution. "It is the strong arm of the Court, and to render this "operation benign and useful, it must be exercised with "great caution, and when necessity requires it. It is an "extremely rare case and may be considered if it ever "happened as an anomaly for a court of equity to inter-"fere at all, and much less preliminarily by injunction to "put down a public nuisance which did not violate "the private rights of property but only contravened

" the general policy. In the *Mayor* v. *Thorn* (7 Paige,
" 261) Chancellor Walworth said that a court of equity
" does not interfere to enforce the penal laws of the state
" by injunction unless the act sought to be restrained is
" a nuisance. * * * The statute in this case fur-
" nished an adequate remedy for the public wrong, and
" if it does not indemnify those who pursue any mechan-
" ical trade for the incidental injury which they as a
" class may sustain it is because human means cannot
" furnish a remedy for every injury, and it is better that
" some minute evils should go unredressed than that a class
" of remedies should be adopted which would be pro-
" ductive of more harm than benefit.

" Limits of the powers of injunction have been pre-
" scribed by the wise and good men who have presided in
" the courts of equity in this state and in the mother
" country, and I am not inclined to go beyond them."

The case of the *Mayor of Hudson* v. *Thorn* (7 Paige, 261) referred to by Justice Strong in the case cited last *supra*, was one in which the Mayor of the City of Hudson sought injunction to restrain the erection or construction of a wooden frame building within the limits of said city in violation of an ordinance of that city.

In *Moore* v. *Brooklyn City R. R. Co.* (108 N. Y. p. 98), it was sought by complainant to compel the defendant to maintain the terminus of its railroad at a given point according to an act of the legislature, and to prevent it from changing it from that point. The complainants were the Commissioners of Highways of the City of Brooklyn. The court below denied the relief and the

Court of Appeals affirmed the judgment. It is said in the opinion—

"It is, we think, a conclusive answer in this case to the "remedy by injunction that no public injury will result "from the proposed act of the defendant. The threat- "ened violation of a mere naked legal right, unaccompanied "by special circumstances, is not a ground for injunction "when, as in this case, legal remedies are adequate to "redress any resulting injuries."

In *McHenry* v. *Jewett* (90 N. Y. p. 58), the plaintiff was the owner of certain shares of railroad stock transferred on the books of the company to the defendant as trustee for a person to whom they had been pledged by the plaintiff. Plaintiff sought to restrain the defendant from voting the shares at a meeting of the stockholders. *Nisi prius* Court granted the preliminary injunction, from which the defendant appealed. Chief Justice Andrews, delivering the opinion of the Court, says:—

"It is claimed on the part of the plaintiff that within "the general rule that a pledgee has no right to use any "pledge, the defendant is not entitled to vote upon "the shares, which, it is insisted is a use of the "shares in violation of this rule; on the other hand "the defendant claimed that the voting power "passed to the pledgee of corporate shares trans- "ferred on the books of the corporation to the "pledgee as incident to the pledge, and according to the "presumed intention. Without considering this ques- "tion but considering the plaintiff's claim, it does not fol- "low that he is entitled to an injunction restraining the

" defendant from voting on the shares. It is not suffi-
" cient to authorize the remedy by injunction, that a vio-
" lation of a naked legal right of property is threatened.
" There must be some special ground of jurisdiction, and
" where an injunction is the final relief sought, facts which
" entitle the plaintiff to this remedy, must be averred in
" the complaint and established on the hearing. The
" complaint in this case is bare of any facts authorizing
" final relief by injunction, neither injury to the property,
" inadequacy of the legal remedy, or any present or seri-
" ous emergency or danger of loss or other special ground
" of jurisdiction is shown by the complaint; and the com-
" plaint therefore does not show that the plaintiff is enti-
" tled to final relief by injunction."

In the village of Brockport (13 Abbot's New Cases, p. 469), the Court refused to enjoin the construction of certain wooden buildings within established fire limits contrary to ordinance. After referring to the *Mayor* v. *Thorn* (7 Paige, 261, *supra*) and other authorities, Justice Rumsey, in delivering the opinion of the Court, says:—

" With this array of authorities against the claim of
" the plaintiff, I shall feel bound to vacate this injunction,
" unless there is something in the act for the incorpora-
" tion of villages which gives to a court of equity, juris-
" diction to enforce such an ordinance. It is a well set-
" tled law in this country that when a statute describes
" the mode of enforcing an ordinance, no other mode can
" be pursued (Dillon Mun. Corp. 3d Ed., Sec. 410).
" The statute in this case has prescribed that the trus-
" tees may impose for the enforcing of this ordinance a

" penalty of one thousand dollars, which they have done.
" To enforce an ordinance of this kind does not mean to
" prevent its violation but to recover the penalty or
" inflict the punishment imposed for disobedience, and so
" we have the word used in the text writers (Dillon Mun.
" Corp. Sec. 409–412)."

The Village of Waupun v. *Moore* (34 Wis. 450). An ordinance of Waupun Village prohibited the erection of wooden buildings within fire limits, imposing a penalty of fifty dollars for violation. The ordinance itself authorized suit in a court of equity for injunction to restrain violation. The complainants, the president and trustees, brought such suit against the defendant Moore. The injunction was denied on the grounds that no injury was shown and that an ordinance could not confer equitable powers upon a court in such cases.

The Court (Lyon, J.) says:—

"The jurisdiction of courts of equity in proper cases,
" to restrain the erection or maintenance of a nuisance,
" public or private, is undoubted; but the defendant was
" not about to erect a nuisance; it is unlawful for him to
" erect the building in question; it is made so by the
" ordinance alone; without the ordinance, no one can suc-
" cessfully dispute his right to do so. The question is,
" therefore, will a court of equity enjoin an act which
" would otherwise be lawful, but which is made unlawful
" by a village ordinance or by law?

" We find the principle stated in several very respect-
" able authorities, that equity will not lend its aid to
" enforce by injunction the by-laws or ordinances of a

" municipal corporation, restraining an act, unless the act " is shown to be a nuisance, *per se*. (High on Injunctions, " Sec. 788; *Mayor, etc., of Hudson* v. *Thorn*, 7 Paige, " 261; *Philips* v. *Allen*, 44 Pa. St. 481; Eden on Injunc- " tions, 160; *Schuster* v. *Metropolitan Board of Health*, " 49 Barb. 450; Grant on Corporation, 84; 78 Law " Library, 94.) To hold that an injunction can properly " issue in this case, would be to overturn all of the author- " ities on the subject, and to interpolate into the law " a new rule or principle of equity jurisprudence. This " we have no right or authority to do. We may not " make the law, but only declare it as we find it."

The Village of St. John v. *McFarlan* (33 Mich., p. 72). This was another suit brought to restrain the violation of ordinances establishing fire limits by the construction of wooden buildings. This case goes further than any of the other cases cited. It was claimed that if the relief by injunction was refused there was no other adequate remedy, as there was no penalty prescribed, a claim similar to the one made in the case at bar. It was distinctly held that injunction would not apply unless the act complained of was in itself a nuisance; the act might be prohibited and be in itself illegal, but this did not give equity jurisdiction; something more was required. Referring to the fact that there was no other remedy, the Court says:—

" This may be true under the ordinance set forth. " That the legislature, however, can give the village " power to establish fire limits and enforce obedience " thereto was not denied, and could not well be. If a " proper ordinance was framed with the appropriate " penalty for all violations of its provisions, we think

" that the remedy at law would be found adequate. The " fact that the remedy was not adequate in this particu- " lar case, on account of the ordinance not being suffi- " ciently stringent in its provisions, cannot give this " court jurisdiction to interfere."

Particular attention is invited to the case of the *Health Department of the City of New York* v. *Purdon* (99 N. Y. 237). The action was brought by the plaintiff the Board of Health to restrain the sale of adulterated teas made in violation of laws prohibiting the sale of adulterated goods. The General Term of the Superior Court of the City of New York refused the injunction, and the Court of Appeals affirmed the judgment. It was held by the Court that although the teas sold were in fact adulterated, it must appear that the teas were dangerous to human life or detrimental to health, or unwholesome, or the occasion of great public inconvenience, before an injunction could issue. This case goes over the authorities and holds that although it appeared that the teas were somewhat adulterated, this was only one element necessary to be established; it must also appear by clear, incontrovertible evidence, to be a case of pressing necessity and imminent danger of great and irreparable damage, in order to warrant injunctive interference; "for if the evidence be conflicting and the injury to the public doubtful, that alone will constitute a ground for withholding this extraordinary interposition." The evidence in that case was wholly expert evidence, and conflicting at that, and the Court refused to disturb the findings of the court below upon this question. This case has another significance in view of the claim made by the

counsel for the complainant, that the answer admits the escape of certain light flocculent matter from the hydraulic mines of respondent, into the navigable waters, but denied to it any injurious effect. Under the case last above cited, it is clear that this is simply a question of fact, and if the fact is as alleged by the answer it is a complete defense.

In the case of *State ex rel Wood, Atterney-General* v. *Schweickardt et al.* (19 S. W. Rep., p. 47) the state, through the Attorney-General, brought suit to restrain the defendants from selling whiskey, wine, liquor, or any kind of intoxicant refreshments in Forest Park, St. Louis, and from carrying out the terms of the provisions of a certain ordinance relative thereto. The Court held that injunction would not lie, going thoroughly over the authorities on this subject and concluded its opinion as follows:—

" If such a proceeding as this can be upheld either as " to injunctive relief, or to obtaining a decree declaring " null any ordinance which any one of the numerous cities " of this state may enact, to open or to close some blind " alley, or to arrest some vagrant, or to remove some " dead animal, or to correct some foul odor, then the time " of the Attorney-General and all his subordinates will " be very largely occupied, and the different circuit " courts will be speedily thronged with such causes."

It is impossible to read these cases without coming to the conclusion, that the fact that an act has been made criminal, or is prohibited by law, is wholly a false quantity in determining the question whether it is restrainable by

equity or not. If the act cannot be restrained without prohibitory law, it cannot with it. The equity jurisdiction depends upon other conditions; whether the act in itself, without reference to interdiction by law, will cause injury to property rights in a pecuniary sense; whether such injury is irreparable; whether it can be avoided by the conduct of the complainants; whether there can be an adequate remedy at law; and whether some other remedy is prescribed by law; but the question of injury, and of its nature, relates to property rights in a pecuniary sense. If these conditions coincide and coexist, and the injury is clearly established and the right of the complainant and his injury are clearly established, equity will interfere by injunction whether the act be criminal or not, or prohibited or not. If they do not exist, then equity will not grant relief by injunction, whether the acts are prohibited or not. Usually a legislative act prescribing an offence and prohibiting conduct, does not attempt to confer injunctive powers upon the courts for enforcement of such enactment. Sometimes, however, this is done, and in some instances courts have declined to act under such authority.

In the case of the *City of Janesville* v. *Carpenter*, 77 Wisconsin, 288 (cited and quoted from at length by Mr. Cross in his brief) such power was conferred upon the Court and was rejected. Under the Act of July 2d, 1890 (26 U. S. Stats. 209) prohibiting conspiracies to obstruct the United States mails, and the interstate commerce, such powers were expressly conferred upon the several circuit courts. In the opinion of the Court in *In re Debs*, *supra*, however, they declined to ground their decisions

upon this act. At the close of the opinion the Court says:—

"We enter into no examination of the Act of July "2d, 1890, c. 647, 26 Stats. 209, upon which the Circuit "Court relied mainly to sustain its jurisdiction. It must "not be understood from this that we dissent from the "conclusions of that Court in reference to the scope of "the Act, but simply that we prefer to rest our judg- "ment on the broader ground which has been discussed "in this opinion, believing it of importance that the prin- "ciples underlying it should be fully stated and affirmed."

The power of equity to restrain obstruction to navigation existed long prior to the passage of the Caminetti Act. As shown by the briefs in this case on both sides, it has been exercised. No provision of the Caminetti Act purported to or had the effect to disturb, or in any way change, the equitable jurisdiction of the Courts; so that the allegations of the bill to the effect that a debris commission had been appointed and organized, that the Caminetti Act had been passed and gone into effect, that it required the respondent, if it desired to mine by the hydraulic process in the district referred to, to file a certain petition and to make, execute and deliver a certain deed of surrender, and prohibiting it from mining unless it complied with such requirements, are wholly immaterial averments, so far as they relate to the relief demanded, and are subject as such to be stricken from the bill upon the motion of the respondents.

To say: "It is true that equity will not interpose to restrain a criminal act where some right of property or

right of control is not involved," is not an adequate statement; it is true, but it is not half the truth. Equity will not interpose unless there is a threat of irreparable injury to property and there is not other adequate relief. There are many rights of property, and rights of control of property not thus protected; as for instance in ejectment, of which the essence is the right to the possession and control of property, equity does not grant relief, *pendente lite*, or permanent. There are comparatively few cases involving rights of property and control of property in which equity interposes by injunction. While it has been held that the navigable waters of the country, both foreign and internal, may be regarded as property in such sense as to meet the rule now contended for, and to warrant a court of equity in enjoining injury to navigation (*Gilman* v. *Philadelphia*, 3 Wall. 713–724), not a single case can be found in which such relief was granted, where there was not a direct overt act and threat of obstruction to navigation. The most diligent search has not enabled us to find such a case. In every instance in which this form of remedy has been resorted to, it has been against some act, which in itself directly interfered with navigation, such as the construction of wharves, piers, bridges, dams, etc., etc. Not one single instance has been cited by the counsel for complainant in which injunction was sought to restrain injury to navigation, where the question was not left open for the determination by the Court, whether the act complained of did or did not contribute to the injury of navigation. On the contrary, the authorities are uniformly the other way (*Gunter* v. *Geary*, 1 Cal. 466; *Middleton* v. *Franklin*, 3 Cal. 241;

Blank v. *Klumpke*, 29 Cal. 156; *People* v. *Davidson*, 30 Cal. 319).

In the New York case, in which the Court refused to enjoin the sale of adulterated teas (*Health Department* v. *Purdon*, 99 N. Y. 237), the question of injury and damage was held to be the subject of inquiry as a vital issue in the case.

In the Debs case (158 U. S. 564), *supra*, the Court discussed this question. The acts complained of, among others, were direct interference with interstate commerce, and the power of equity to restrain obstruction of this kind to such commerce. As has been seen, such injunctive power was upheld in that case, upon the grounds that the interference was with property rights under charge and protection of the government, to which the acts complained of contributed direct injury. If it had been established at the trial in that case, or it had been admitted to be true, that no act of the petitioner Debs, set forth by the bill, upon which the injunction in that case was founded, committed any injury, or in any way contributed to the obstruction of the United States mails, or interstate commerce, is it possible to believe that the Court in that case would have sustained the injunction?

In the case at bar, the denials and allegations of the answer are to be taken as true for present purposes, and the truth so stated is:—

That the respondent is mining in the State of California, in the district drained by the Sacramento River, and that its operations are by the hydraulic process.

That he has omitted to file a petition for a permit to so mine with the California Debris Commission, or to sur-

render or transfer to the United States, by deed or otherwise, his right to carry on and regulate his hydraulic mining operations.

That by said mining operations and such omission he has neither committed, or threatened, any injury or obstruction to commerce or to navigation of any of the navigable waters of said state, or of the nation.

CONCLUSION.

In conclusion, we contend, that the scheme presented by the Caminetti Act is one offered to the hydraulic miner for his acceptance, and if accepted, has the effect of relieving him from responsibility or liability to the United States for any injury or obstruction to commerce or the navigable waters, so long as the Act is complied with; just as a bridge or other obstruction to navigation is, because so authorized, a lawful structure, however much it may interfere with public right of navigation (*State* v. *Wheeling & B. Bridge Co.*, 18 How. 421; *Silliman* v. *Bridge Co.*, 2d Wall. 403; *Georgetown* v. *Canal Co.*, 12 Pet. 97; *H. & S. J. R. Co.* v. *M. R. P. Co.*, 125 U. S. 260); that to compel by mandatory laws the hydraulic miner to petition the government for permission to enjoy the right of ownership of his own property (Sec. 9) and to surrender to the United States his right to regulate the manner of such enjoyment (Sec. 10), and of pursuing an innocent and legitimate business, simply because he carries it on in a certain prescribed district, and his property happens to be situated in that district, would be an unconstitutional exercise of power by the general government, and the Court

ought not to give such meaning and intent to any statute, but on the contrary should construe it so that the act may harmonize with constitutional requirements.

We have also shown that by the very terms of the Act, hydraulic mining without injury to navigation is not declared to be unlawful, and is not prohibited by the Act; but if it were otherwise, and the acts of the respondent complained of are unlawful, nevertheless the Court cannot grant relief, in the form of injunction, because there is an entire absence of irreparable or other injury to commerce or the navigable waters of the state, or United States, and because a court of equity will not interpose to restrain the commission of any act merely because it is illegal or prohibited by law.

We respectfully submit that the judgment of the Circuit Court should be reversed.

C. W. CROSS,
Solicitor for Appellant.

No. 405.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY, A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE.

SAMUEL KNIGHT,
Assistant U. S. Attorney and Solicitor for Appellee.

*Filed*_____ *1898.*

_____ *Clerk.*

*By*_____ *Deputy Clerk.*

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY, a Corporation,

Appellant,

vs.

THE UNITED STATES,

Appellee.

No. 405.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This in an action in equity brought in the court below by appellee, the United States, to restrain appellant, The North Bloomfield Gravel Mining Company (a corporation), from mining on the headwaters of the Yuba river by the hydraulic process until it shall have complied with the provisions of the act of March 1, 1893 (27 U. S. Stats. at Large, 507), commonly called the "Caminetti Act," hereinafter referred to. As appellant's counsel in his brief fails to observe the same care in setting forth the bill that he observed in stating the answer, the Court's

attention is respectfully directed in this regard to the transcript of record (pp. 1-9).

It may be here further observed, in passing, that although a demurrer, exceptions, and motion to strike out were originally interposed to the answer, and are printed in the transcript, as stated by appellant's counsel (Brief, p. 8), it was subsequently agreed between the parties that this form of objection to the answer should be considered withdrawn, and the case submitted to the Court below upon bill and answer only, in accordance with equity practice,

Grether et al. v. *Wright et al.*, 75 *Fed.* Rep. 742;

and it was so understood by the Circuit Court in rendering its opinion.

United States v. *North Bloomfield Gravel Min. Co.*, 81 Fed. Rep. 243, 244, 247.

POINTS AND AUTHORITIES.

Briefly stated, appellant practically contends here, as it did in the Court below:

(1.) *That under the provisions of the act in question the mining company has the option whether or not to submit to the jurisdiction of the California Debris Commissioner, created by that act, and obtain the permit to mine by the hydraulic process there provided for; otherwise the act is unconstitutional.*

(2.) *That where the impairment by appellant, actual or threatened, of the navigability of the public streams admittedly used by it is not judicially susceptible of proof, an action for an injunction will not lie to restrain it from carrying on its hydraulic mining and the consequent use of these streams. In other words, in the case at bar the government is remediless.*

While appellant ostensibly disclaims any attack upon the constitutionality of the act under which the bill in equity in this case was brought, for the obvious reason that such act was passed partly in aid of the hydraulic miners in the State of California, and relieves them as far as possible and consistent with the rights of others from the unfortunate situation in which they were placed, because of the injurious character of their business upon the property and rights of others situated farther down the streams—in other words, because of the miners' apparent inability to observe the axiom, "Sic utere tuo ut non alienum laedas,"—nevertheless it covertly attempts to accomplish the same purpose by contending for a forced and unnatural interpretation of the language of section 9 of the act, which, it is submitted, is wholly at variance with and does violence to its obvious meaning, and is inconsistent with its phraseology and the intention of Congress in enacting it. To use the counsel's own language in stating his position in this respect it is averred (Brief, p. 21):

> "We do not contend, nor have we contended, that the act is unconstitutional, but we do insist

that the construction contended for by complainant's counsel would render the act both unconstitutional and against natural right."

And again he says (Brief, p. 59):

"If the contention, however, of complainant's counsel is correct, that the present act is mandatory in its requirements upon hydraulic miners, then it is certain that Congress has made an unconstitutional invasion upon the right of this State to regulate its own affairs, and has even gone further than the State itself could go under its own constitution. * * * " (Brief, p. 60.) "If this section is mandatory, it is thoroughly unconstitutional."

I.

A Statute is to be Construed to Effect the Purpose Intended.

It is a cardinal rule of construction that the purpose of the legislature and the objects aimed at are to be considered, and if the language used is susceptible of more than one construction, it is to receive that which will effectuate such object and purpose rather than tend to defeat it.

"It is the spirit and purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be so construed as to carry out the legislative in-

tent, even although such construction is contrary to the literal meaning of some provisions of the statute."

People v. *Lacombe*, 99 N. Y. 43.

"It is a cardinal rule of construction that a statute must be construed with reference to the objects intended to be accomplished by it."

People v. *Dana*, 22 Cal. 11.
See also *Sherman* v. *Buick*, 32 Cal. 241.
Helm v. *Chapman*, 66 Cal. 291.

"In the construction of a statute, the intention of the legislature must govern, and this must be ascertained not from a particular section, but from the whole statute."

Smith v. *Randall*, 6 Cal. 48.

It was said by Mr. Chief Justice Fuller:

"Nothing is better settled that that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

Law Ow Bew v. *United States*, 144 U. S. 59.

Said Mr. Justice Brewer:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to rem-

edy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the intention of the legislative body."

Holy Trinity Church v. *United States*, 143 U. S. 463.

Said Mr. Justice Davis:

"In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress and this is to be ascertained from the language used. But Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of the particular provisions in it."

United States v. *Union Pacific R. R. Co.*, 91 U. S. 79.

Cases to this effect might be cited without number, including several recent federal decisions rendered in this Circuit; but this seems hardly necessary.

II.

History of the Times.

In order to assist us in arriving at a proper construction of the act under consideration, let us glance for a moment at the history of the times when this measure was passed and the conditions under which Congress thus acted. It is best stated in the language of the learned Circuit Judge who delivered the opinion in the Court below (81 Fed. Rep. at pp. 248, 249):

> "Long-continued mining by this (the hydraulic mining) process, in the territory drained by the rivers mentioned (in the bill), had resulted in depositing in them and upon much of the adjacent land vast quantities of debris, thereby, to a great extent, impeding the navigation of the waters, and rendering valueless large quantities of otherwise fertile lands. This unfortunate condition of affairs necessarily gave rise to many and bitter contests in the courts between the conflicting interests. Some of the suits were brought in this court and many of them in the courts of the State, resulting, ultimately, wherever it was shown that such hydraulic mining was causing injury to the public streams or waters, or to others' lands, in perpetually enjoining such mining. One of such suits was brought against the present defendant in this court to en-

join it from working by the hydraulic process the same mining ground it is now operating. That suit resulted in a decree enjoining the defendant from so working its mining ground; but the decree contained a provision to the effect that if, in the future, the defendant corporation should show to the Court that it had constructed impounding reservoirs which would successfully impound its mining debris, the decree might be modified so as to permit the operation of the mine. That case was tried and decided by Judge Sawyer, and is reported in 18 Fed. Rep. 753, under the title of Woodruff v. Mining Co. Some time after the making of the decree the defendant established a system of impounding works, and commenced again its mining operations. That action on the part of the defendant resulted in a suit brought in this court by the United States against the defendant, to obtain an injunction prohibiting it from continuing its hydraulic mining operations. After a trial of that case, in which much testimony was introduced (53 Fed. Rep. 625), this Court (Judge Gilbert presiding) found that by the construction and use of its impounding works the defendant prevented the escape of any debris from its mine into the navigable waters of the rivers mentioned that would tend to impair or injure their navigability, and therefore denied the injunction prayed for. In neither of

these decisions was mining by the hydraulic process regarded, in and of itself, as unlawful. That it is not unlawful, but highly useful and commendable when properly conducted, and without injury to the property or rights of others, hardly needs judicial decision. In

Yuba Co. v. *Cloke*, 79 Cal. 239, 243, 21 Pac. Rep. 740, 741,

the Supreme Court of California said:

'It seems to us it must be conceded that the business of hydraulic mining is not within itself unlawful or necessarily injurious to others. The unlawful nature of the business results from the manner in which it is carried on, and the neglect of parties engaged therein to properly care for the debris resulting therefrom, whereby it is allowed to follow the stream, and eventually cause injury to property situated below.'

"Nobody wanted gold mining by the hydraulic process stopped so long as it could be prosecuted without injury to the navigable waters, or to the property or rights of others. And so an effort was made by the parties most directly interested—the miners and agriculturists—to induce Congress to legislate upon the subject, which effort resulted in the passage of the act of March 1, 1893."

It is thus apparent that this measure was intended for the benefit of both the farmer and the miner. The farmer

was to be protected by having hydraulic mining absolutely prohibited in the territory mentioned in the act, except under the supervision of a body of skilled experts, the Debris Commission; and the miner was to be protected in having a proper and scientific determination made as to whether, and if so under what conditions and circumstances, he could mine with safety.

The act is entitled "An Act to create the California Debris Commission and regulate hydraulic mining in the State of California"; and in setting forth its scope and character we are further tempted, for clearness of expression, to again quote from the opinion of the learned Circuit Judge, first calling the Court's attention especially to sections 3, 9, and 10 of the act, providing as follows:

> "Sec. 3. That the jurisdiction of said commission, in so far as the same affects mining carried on by the hydraulic process, shall extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the State of California. Hydraulic mining, as defined in section eight hereof, directly or indirectly injuring the navigability of said river systems, carried on in said territory other than as permitted under the provisions of this act, is hereby prohibited and declared unlawful.
>
> * * * * * * * * *

"Sec. 9. That the individual proprietor or proprietors, or, in case of a corporation, its manager or agent appointed for that purpose, owning mining ground in the territory in the State of California mentioned in section three hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition, setting forth such facts as will comply wth law and the rules prescribed by said commission.

"Sec. 10. That said petition shall be accompanied by an instrument duly executed and acknowledged, as required by the law of the said State, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the debris resulting from the working of said mine or mines shall be restrained, and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said State; *provided*, that they shall not interfere with the navigability of the aforesaid rivers."

Said the Court below (pp. 249-251):

"As enacted, after creating the California Debris Commission, and providing for the appointment of its members, and for the filling of vacancies occurring therein, and for the exercise of the powers conferred upon it, under the direction of the secretary of war and the supervision of the chief of engineers, and authorizing the commission to adopt rules and regulations not inconsistent with law, to govern its deliberations and procedure, the act declared the jurisdiction of the commission, in so far as the same affects mining carried on by the hydraulic process, to extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the State of California. It declared for the purposes of the act, 'hydraulic mining' and 'mining by the hydraulic process' to have the meaning and application given to those terms in the State of California. That meaning is sufficiently set out in the bill in the present case. The act prohibited and declared unlawful such hydraulic mining 'directly or indirectly injuring the navigability of said river systems, carried on in said territory, other than as permitted under' its provisions. (Sections 3, 22.) But this was by no means the extent of the act or of its prohibition. Its very purpose was to provide a means by which such mining could be carried on in the territory named without injuring the

navigability of the said river systems, directly or indirectly. Recognizing the great damage that had been done to the navigable waters mentioned by hydraulic mining in the past, it created a commission of skilled officers to exercise the powers conferred upon it under the direction of the secretary of war and the supervision of the chief of engineers of the army, and by section 4 of the act made it the duty of the commission to mature and adopt, from examinations and surveys already made, and from such additional examinations and surveys as the commission should deem necessary, such plan or plans

'As will improve the navigability of all the rivers comprising said systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from debris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, the navigability of said rivers to the condition existing in eighteen hundred and sixty, and permitting mining by the hydraulic process, as the term is understood in said state, to be carried on, provided the same can be accomplished without injury to the navigability of said rivers or the lands adjacent thereto.'

"By section 5 of the act it is made the duty of the commission to—

'Further examine, survey, and determine the utility and practicability, for the purposes herein-

after indicated, of storage sites in the tributaries of said rivers and in the respective branches of said tributaries, or in the plains, basins, sloughs, and tule and swamp lands adjacent to or along the course of said rivers, for the storage of debris or water or as settling reservoirs, with the object of using the same by either or all of these methods to aid in the improvement and protection of said navigable rivers by preventing deposits therein of debris resulting from mining operations, natural erosion, or other causes, or for affording relief thereto in flood times, and providing sufficient water to maintain scouring force therein in the summer season; and in connection therewith to investigate such hydraulic and other mines as are now or may have been worked by methods intended to restrain the debris and material moved in operating such mines by impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as science, experience, and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid.'

"Sections 9 and 10 of the act are as follows:

* * * * * * * * *

"Subsequent sections provide for a joint petition by the owners of several mining claims so situated

as to require a common dumping ground or restraining works, and for proceedings of the commission thereon, including the provision contained in section 14, that upon the completion of such works as may be authorized and required by order of the commission—

'If found in every respect to meet the requirements of the said order and said approved plans and specifications, permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of this act.'

"Section 15 is as follows:

'Sec. 15. That no permission granted to a mine owner or owners under this act shall take effect, so far as regards the working of a mine, until all impounding dams or other restraining works, if any are prescribed by the order granting such permission have been completed, and until the impounding dams, or other restraining works, or settling reservoirs provided by said commission have reached such a stage as, in the opinion of said commission, it is safe to use the same; provided, however that if said commission shall be of the opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said

systems and the work of said commission, then the owners or owners of usch mine or mines may be permitted to commence operations.'

"And by section 17 it is declared:

'That at no time shall any more debris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers and the respective branches of each, worked under the provisions of this act than can be impounded within the restraining works erected.'"

There is therefore presented in this act a complete, comprehensive scheme, whereby hydraulic mining is the territory drained by the Sacramento and San Joaquin river systems may, under certain conditions and limitations, be prosecuted, otherwise prohibited.

III.

The Act of March 1, 1893, is Within the Commercial Powers of Congress.

See *Section 8 of Article I of the Constitution of the United States*, and decisions hereinafter referred to.

(1.) *Congress under its commercial powers, can control the navigable waters of the Sacramento river system and tributary streams, though situated entirely within the boundaries of the State of California, as the ocean is their outlet.*

§ *Am. and Eng. Ency. of Law*, vol. 3, page 702, and note,

"The (commercial) power of Congress is restricted to such waters as can be employed in commerce between a State and foreign nations, or some other State. * * * "

River and Harbor Act of September 19, 1890, (hereinafter referred to).

Gilman v. *Philadelphia*, 3 Wallace, 713.

The Daniel Ball v. *United States*, 10 Wallace, 557.

Cardwell v. *American River Bridge Co.*, 113 U. S. 205.

Escanaba & Michigan Transportation Co. v. *Chicago*, 107 U. S. 678.

(2.) *This control by Congress over the navigable waters of the United States is absolute, and, in its exercise, Congress can arbitrarily determine what is and what is not an injury to such waters, or an obstruction to commerce upon them.*

Said the Supreme Court of the United States in *South Carolina* v. *Georgia*, 93 U. S. 4:

"That the power to regulate interstate commerce and commerce with foreign nations, conferred upon Congress by the constitution, extends to the control of navigable rivers between States, rivers that are accessible from other States, at least to

the extent of improving their navigability, has not been questioned during the argument, nor could it be with any show of reason."

We may here remark, parenthetically, that the rivers used by the appellant company to carry off some of its debris, as admitted in the answer, are the objects of improvement by the complainant.

See the *River and Harbor Acts of 1890 for 1894 and 1896*, hereinafter referred to.

The Court said further:

"The power to regulate commerce, conferred by the constitution upon Congress, is that which previously existed in the States. As was said in *Gilman* v. *Philadelphia*, 3 Wall. 724:

'Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and, to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than that in which they lie. For this purpose *they are the public property of the nation* [the italics throughout are ours], and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstructions to their navigation interposed by the State or otherwise; to remove such obstructions where they exist; and to provide, by such sanc-

tions as they may deem proper against the occurrences of the evil, and for the punishment of the offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the National constitution, and which have always existed in the Parliament of England.' Such has uniformly been the construction given in that clause of the constitution which confers upon Congress the power to regulate commerce.

(3). *The exercise of this power by Congress, through its duly appointed agents, is not the subject of judicial investigation.*

Miller v. *Mayor etc. of New York*, 109 U. S. 385.

In this case an act of Congress made the approval of the plans of the New York and Brooklyn bridge, and the consequent lawfulness of that structure, depend upon the determination of the secretary of war as to

> "Whether the bridge, when built, would conform to the prescribed conditions of the act 'not to obstruct, impair, or injuriously modify the navigation of the (East) river.' * * * * But, until the secretary approved the plan and location and notified the company of the same in writing, the bridge should not be built or commenced."

So, here, the question of the effect of proposed hydraulic mining upon certain streams is left by Congress to the determination and judgment of a board of experts, the

California Debris Commission. Until they signify their approval by granting a permit to so mine, this industry, as far as it uses these streams, is inhibited by the act of Congress under consideration. Although in the New York case the complainant alleged injury, while, in the case at bar, the appellant denies it, the principle is the same and the rules of law enunciated in the former case are, we respectfully submit, equally applicable to the latter.

Said the Supreme Court:

> "The erection of the bridge at the elevation proposed was authorized by the action of both the State and federal governments. It would, therefore, when completed, be a lawful structure. If, as now completed, it obstructs in any respect the navigation of the river, it does so merely to an extent *permitted by the only authorities which could act upon the subject.* And the injury, then apprehended and alleged by the plaintiff and now sustained, is only such as is common to all persons engaged in commerce on the river and doing business on its banks, and therefore, *not the subject of judicial cognizance.* * * * *
>
> "It is contended by the plaintiff, with much earnestness, that the approval by the secretary of war of the plan and location of the bridge was not conclusive as to its character and effect upon the navigation of the river, and that it was still open to

him to show that, if constructed as proposed, it would be an obstruction to such navigation, as fully as though such approval had not been had. It is argued that Congress could not give any such effect to the action of the secretary, it being judicial in its character. There is in this position a misapprehension of the purport of the act. By submitting the matter to the secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the secretary of war as an agent to ascertain that fact. *Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable rivers between the States or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may, in direct terms, declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction;* and, in the latter case makes its declaration take effect when those conditions are complied with. The act in question requiring the approval of the secretary before the construction of the bridge was permitted. was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular in-

formation. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act, as a declaration of legislative will, must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate.

S. C. v. *Geo.*, 93 U. S. 13."

Says *Mr. Cooley*, in his work on

Constitutional Limitations, pages 722, 723, and 732,

"It is not doubted that Congress has the power to go beyond the general regulations of commerce, which it is accustomed to establish, and to descend to the most minute directions, if it should be deemed advisable."

Briefly speaking, this power of Congress is of two kinds:

(First) Where the regulations governing commerce are national in their character and uniform in their operation, it is exclusive.

(Second) Where the regulations to be prescribed are local and limited in their nature, the States can legislate *until* Congress acts.

Said the Court, speaking through Mr. Justice Field, in the case of

The Gloucester Ferry Co. v. *Penn.*, 114 U. S. 215,

which was an action brought by the State of Pennsylvania to collect a tax upon the capital stock of the ferry company, an interstate concern,

> "While with reference to some of them which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them, yet, where they are national in their character, and require uniformity of regulation, affecting alike all the States, the power of Congress is exclusive."

And just prior to this quotation the learned Justice said:

> "It matters not that the transportation is made in ferry-boats which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose as

well as the purchase, sale, and exchange of commodities. The power to regulate that commerce as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which shall be governed—that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to, duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety."

This case is further commended to the attention of the Court, for the reasoning of the learned Justice who decided it, in the course of which he illustrates some of the minute particulars to which Congress has descended under the power which the constitution has conferred upon it.

See further the case of

Mobile County v. *Kimball*, 12 Otto, 691,

which was an action brought by a contractor to collect the residue of some bonds issued under an act of the legislature of Alabama for the improvement of Mobile harbor, where the same learned Justice said:

"The objection that the law of the State, in authorizing the improvement of the harbor of Mobile, trenches upon the commercial power of Congress, assumes an exclusion of State authority from all

subjects in relation to which that power may be exercised, not warranted by the adjudications of this Court, notwithstanding the strong expressions used by some of its Judges. That power is indeed without limitations. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of several States,and to adopt measures to promote its growth and to insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States, which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its nonaction in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose

that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation.

"Of the class of subjects local in their nature, or intended as mere aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys, and beacons to guide mariners to the proper channel in which to direct their vessels. * * * *

"The uniformity of commercial regulations which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where, from its nature or sphere of its operation, the subject is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be

taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act, they may be regulated by State authority.

"The improvement of harbors, bays, and navigable rivers within the States falls within this last category of cases. The control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government. Legislation of the States for the purposes and within the limits mentioned do not infringe upon the commercial power of Congress; and so we hold that the act of the State of Alabama of February 16, 1867, to provide for the 'improvement of the river, bay and harbor of Mobile,' is not invalid."

But, it has been argued, no damage to the streams has been alleged or could be proven; the appellant is only using them.

Our answer is:

(*a*) The act in question makes no distinction in this regard and is not susceptible of any, as far as this case is concerned, in the construction that we claim should be given to it.

(*b*) As we have heretofore stated, it is for Congress, and not the courts, to decide whether and what use of the streams is or is not an injury.

We have seen in the case of the

Gloucester Ferry Company v. *Penn.*, *supra*,

that Congress can regulate a ferryboat which plies on the navigable waters. We shall shortly see that it can regulate the floating of logs on its waters, can prescribe the methods by which those logs can be allowed to float, and by what class of persons they shall be cared for while floating; and we respectfully submit, that by the same course of reasoning and with equal propriety, and as completely within its commercial powers, Congress can regulate the "light and flocculent matter," which the appellant company puts into the navigable streams, especially where the government seeks to improve them, for they all equally involve the use of these streams.

The question of the constitutionality of the

River and Harbor Act, approved September 19, 1890, 26 Stat. at Large, p. 264,

as raised in the case of

United States v. *City of Moline*, 82 Fed. Rep. 592.

here a criminal information was prosecuted by the government against the city of Moline, under section 5 of ie River and Harbor Act of September 19, 1890, supra, or maintaining across Rock river, a public navigable aterway over which Congress had assumed jurisdiction y improving it, a bridge which the secretary of war, unier the act referred to, had pronounced to be an unreasiable obstruction to navigation, and had notified the unicipal authorities to alter in certain particulars. his the city neglected and refused to do, and moved to iash the information for the reasons, *inter alia*:

> "Second, that the bridge in question was lawfully authorized by the Legislature of Illinois, is the lawful property of the city of Moline, and cannot be taken or injured by the government of the United States without just compensation; third, that the proceedings of the secretary of war giving rise to this information are in pursuance of a statute unconstitutional and therefore void."

So in the case at bar appellant attempts to justify its poion by alleging that the business of hydraulic mining is wful and recognized as such by the laws of the State of lifornia and in many decisions of Court; and further at any proceedings to compel it to observe the Camitti Act, which is analogous to the River and Harbor

Act, supra, are illegal, because that Act creating the Debris Commission and prescribing their powers and duties is unconstitutional if it means what it says. Let us see how the District Judge for the Northern District of Illinois disposes of these contentions:

> "The constitution confers upon Congress the exclusive right to regulate interstate commerce. A waterway like Rock river, emptying into the Mississippi river, though lying wholly within the State of Illinois, is, if navigable, one of the highways of interstate commerce. It leads, with its connections, from points within Illinois to points in other States, and is thus a part of the waterway which, as an entirety, interconnects cities in many States, and carries the commerce of many States. Any obstruction to such a waterway, in the face of a mandate of Congress that the river shall be used as one of its interstate waterways, is open to removal by the proper authority of the United States government.
>
> "*The fact that the State may have authorized the structure is of no avail from the moment that the government of the United States determines to employ the river as such an interstate highway.*
>
> "Has Congress indicated such a purpose? The act of 1888 provides for the location of a canal from the Illinois river, at or near the town of Hennepin, to the Mississippi river, at or near the mouth of Rock river, to be 80 feet wide at the water line, and to have a depth of not less than seven feet of

water, with locks, feeders, etc., and that the secretary of war shall cause to be made and submitted to Congress detailed plans and estimates for such construction. In pursuance of this act the canal was, by the secretary of war, duly located, and detailed plans and estimates for its construction submitted, which plans and estimates included the use of Rock river, averred by the information to be navigable, from a point five or six miles below the bridge in question to a point five or six miles above. Following this action of the war department, the Congress of 1889-90 passed an act authorizing the secretary of war to construct the canal upon the plans and specifications submitted, with power to make certain alterations in respect of the locks and feeders, and with the necessary powers of eminent domain. Following this, the Congress of 1891-92 made appropriations for the construction of such canal, and the acquirement of right of way; and every Congress since has continued such appropriations. These acts clearly indicate a defined purpose upon the part of Congress, as far back, at least, as 1889 or 1890, to use Rock river for a distance of several miles above and below the bridge in question as a part of the proposed waterway. As a navigable waterway of the United States, Congress had at any time the right to enter upon its improvement; and the plans adopted by Congress in effect adopt the river, for the distance pointed out, as a part of the proposed waterway. The acts of Congress, read in connec-

tion with the plans and specifications of the war department upon which the acts proceed, look to a navigable waterway from the Illinois river to the Mississippi, and utilize towards that end so much of the Rock river—a stream admittedly navigable—as seems best adapted to that purpose. The improvement, therefore, is, in effect, an improvement in the navigability of the river. The effect of all these acts is that Congress has taken into its jurisdiction, as one of the navigable waters of the United States, that portion of Rock river where this bridge is located, intending thereby to make it a part of the proposed waterway from the Illinois river to the Mississippi river. From the moment of such a declaration, the power of Congress over the portion of the river designated is supreme. *Any obstruction, however, authorized by the State law, must yield to this superior authority.* * * *

"But it is contended that the proceedings of the secretary of war under the fourth section of the act of September 19, 1890, are invalid, because such section is unconstitutional. The section provides that, whenever the secretary of war shall have good reason to believe that any bridge now constructed over any navigable waterway of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, it shall be his duty, first giving the parties reasonable opportunity to be heard, to give notice to the person owning or controlling such bridge so to

alter the same as to render navigation under it free, easy, and unobstructed, and in giving such notice to specify the changes required to be made, and prescribe a reasonable time in which to make them. If, at the end of such time, the alteration has not been made, the district attorney for the proper district is empowered to bring the criminal proceeding here instituted. * * *

"Now, if Congress can constitutionally authorize any of its executive officers to deal with a case like this, whereby the obstructions may be removed, and the water way opened up, without having first passed an act specifically applicable to the given obstruction, these proceedings ought to be maintained. It will be observed that the power claimed in this instance is not to either authorize the building of a bridge, or ordering its construction, thereby drawing with it the decision of what streams Congress either takes or surrenders jurisdiction over. The power claimed is, in effect, an incident only to the execution of the larger purpose of Congress respecting Rock river, and administrative of that purpose. It is one of the essential administrative acts towards carrying out the special acts of Congress, to the effect that through this river, at this point, there shall be a waterway having capacity for vessels of at least 280 tons burden. The bridge, during the time of its present construction, is an effectual obstruction to such waterway. *If Congress can, by special act, constitutionally endow the arm of the secretary of war with power to remove*

everything that lies in or across that river obstructive of the proposed waterway, why may it not grant such power, with equal efficacy, by a general act applying to all cases as they arise? Whether the act conferring the power be special or general, the war department becomes simply the arm that carries out the legislative will. *It is true that this involves decision of the department, but the department can in no instance be effective and at the same time an insensate and unjudging executive instrument.* In administrative undertakings of this character the directions cannot be so completely foredrawn by Congress that there will be left no questions to the administrative mind to decide. *The test of the legality of the delegation of power is, not that the administrator must himself decide questions as they arise, but, are the questions thus presented essentially judicial?*

"*In this case, two questions alone arise: First.—Is the bridge an obstruction to navigation?* * * * *The first question is purely administrative, and is one that Congress can certainly delegate to the secretary of war.* A thousand questions of equal moment to the parties interested, and of equal difficulty, are necessarily delegated to the great departments of the government every month. In the very nature of things, Congress cannot dispose of them. A government of the size of this, operated upon such a conception, would be clogged immediately. * * * * I hold, therefore, that the act, so far as it is applicable to the case in hand, is constitutional and valid, and the motion to quash will be overruled."

So in the case at bar Congress has unequivocally declared that it has assumed complete jurisdiction over the streams used by appellant by passing the River and Harbor Appropriation Acts of 1890, 1894 and 1896, *supra*.

At page 451 of the first of these acts is found an appropriation of $30,000 for the improvement of the Sacramento and Feather rivers. At pages 453-455 are found provisions forbidding the throwing of a great many enumerated kinds of refuse into the navigable waters of the United States, and prescribing a punishment of fine or imprisonment for so doing; and power is given to the secretary of war to absolutely determine what contemplated improvements or structures in or over these waters are or are not obstructions to said waters. The second act also carried appropriations (p. 358) for the continued improvement of the Sacramento, Feather, and Yuba rivers; and in the act of June 3, 1896, at page 232, Congress has continued to assume control over these streams by providing that a board of engineers should survey them, and report upon a feasible plan for their further improvement.

In the case of

Newport and Cincinnati Bridge Co. v. *United States*, 15 Otto, 470

the facts, in brief, were that the bridge company, under authority from the legislatures of the States of Kentucky and Ohio, and with the assent of Congress, commenced to build a bridge across the Ohio river. Subsequently, and

before its completion. Congress passed an act providing for changes in the plans and structure of the bridge, and providing further, that if the company was damaged by this act, compelling it to make these alterations, it could recover therefor against the United States, in the Circuit Court of the United States for the Southern District of Ohio. The changes were made as directed by the statute; and in pursuance thereof suit was brought in the proper Circuit Court, which dismissed the bill. The bridge company appealed, and Chief Justice Waite delivered the opinion of the Supreme Court, saying in part:

> "But the power of Congress in respect to legislation for the preservation of interstate commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme, and overrides all that the States may do. *When, therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful.* Those who act on State authority alone necessarily assume all the risks of legitimate congressional interference. In the present case, both the Ohio and Kentucky divisional companies were, by express provisions in their respective charters, subjected to this paramount controlling power. The consolidated company was, therefore, prohibited from obstructing navigation more than the laws of the United States authorized, and was required to build its bridge in accordance with

the provisions of the act of 1862, or any other law that Congress might thereafter pass on the subject. Hence the joint resolution of 1869 became, by the operation of both congressional and State enactments, the law on which the rights of the company depend. It was the paramount license for the erection and maintenance of the bridge; and the company, by accepting its provisions, became subject to all the limitations and reservations of power which Congress saw fit to impose.

"*From this we conclude that the withdrawal by Congress of its assent to the maintenance of the bridge when properly made, is for all the purposes of this case, equivalent to a positive enactment that from the time of such withdrawal the further maintenance of the bridge shall be unlawful, notwithstanding the legislation of the several States upon the subject.* If modifications are directed, assent is, in legal effect, withdrawn, unless the required changes are made.

"*It is contended, however, that under the terms of the reservation, the assent of Congress could not be withdrawn until it had been in some way judicially ascertained that the bridge, as authorized, either did, in fact, or would, if built, substantially and materially obstruct free navigation. Such, we think, is not the fair meaning of the language employed.* In the case of the

Wheeling Bridge, 13 Howard, 519,

it was judicially settled in this court that a bridge as constructed did illegally interfere with navigation; but, when afterwards Congress, in the exercise of its constitutional authority to regulate com-

merce, legalized the structure by legislative enactment, the Court held in

Wheeling Bridge, 18 How. 421 (59 U. S. 435) that this act of legislative power removed the objection to the further continuance of the bridge, because, in the opinion of the legislative department of the government, the obstruction which had been erected was no more than those interested in navigation should submit to for the general good. It is to be observed that the question now under consideration is not whether the bridge company has failed to comply with the requirements of the joint resolution, *but whether those requirements are all that the due protection of free navigation demands. The first is, undoubtedly, a proper subject for judicial inquiry, but the last, as we think, belongs to the legislature. Congress, which alone exercises the legislative power of the government, is the constitutional protector of foreign and interstate commerce.* Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt shall be resolved in favor of the government. As Congress can exercise legislative power only, all its reservations of power connected with grants that are made must necessarily be legislative in their character. In the present case the reservation is of power to withdraw the assent which was given

and to direct the necessary modifications and alterations. This was to be done in case the free navigation of the river should at any time be substantially and materially obstructed under the authority which was granted. It was originally a proper subject of legislative inquiry whether the joint resolution made sufficient provision for the protection of commerce. There is nothing to indicate that any different inquiry was to be instituted to determine whether the assent that had been given should be withdrawn, and as the withdrawal involved an act legislative in its character, the necessary presumption is that the necessary inquiry on which it was so predicated would be legislative also. *No provision is made for instituting proceedings to have the question determined judicially; and even if the courts should determine that the bridge did substantially and materially obstruct navigation, Congress could not be compelled to withdraw its assent to the further continuance of the structure* This is evident from the Wheeling Bridge case (*supra*), where, as has been seen, congressional assent to a substantial obstruction was recognized as sufficient to prevent the execution of a decree of this Court requiring the abatement of what, but for this assent, would have been, in the judgment of the Court, a public nuisance. *The withdrawal of assent, therefore, has been left to depend on the judgment of Congress in the exercise of its legislative discretion. For this purpose Congress must make its own inquiries and determine for itself whether the obstruction that has been authorized is so material and so substantial as to justify, under all the circumstances of the case, an exercise of the*

power which was reserved as a condition of the original grant made."

Mr. Justice Field, in his dissenting opinion, sums up the decision of a majority of the Court in the following language:

> *"This Court, thus in effect, decides that the power of Congress over all structures crossing the navigable streams is absolute; and that it can change or remove them at its pleasure without regard to their effect upon the free navigation of the streams and without compensation to the owners."*

The case of

> *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard, 421,

involved a bridge which the Court had declared to be an obstruction and which Congress had a few months thereafter legalized, the Court saying:

> "The regulation of commerce includes intercourse and navigation, *and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction of navigation;* and that power, as we have seen, has been exercised consistent with the continuance of the bridge"; and, further, "now whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If in the meantime, since the decree, this right has been modified by the compe-

tent authority so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the Court cannot be enforced."

See further,

The Daniel Ball v. *The United States, supra.*
Cardwell v. *American River Bridge Co., supra.*
Willamette Iron Bridge Co. v. *Hatch,* 125 U. S. 1.

In the case of

The United States v. *Rum River etc. Boom Co.,* 3 Fed. Rep. 548,

the Court restrained the running of logs over the falls of St. Anthony, where damage was threatened to the government improvements there; and in the cases of

Craig v. *Kline,* 65 Pa. St. 399; 3 Am. Rep. 636, and
Harrigan v. *Connecticut River Lumber Co.,* 129 Mass. 580; 37 Am. Rep. 387,

the Courts held that State statutes prescribing conditions under which the Susquehanna, Lehigh, and Connecticut rivers could be used in the floating of logs, were constitutional, Agnew, J., saying in the former:

"It is a difficult problem now to define the boundaries of State and Federal powers. The doctrine of the rights of States pushed to excess culminated in Civil War. The rebound caused by the success of the federal arms threatens a consolidation equally serious. In this condition the landmarks of the constitution, as planted by Chief Justice Marshall and his associates on the solid ground of

reason and a due regard to the rights of the States and of the Union, constitute the only safe guides of decision. The power of Pennsylvania to legislate upon the navigation of the river Susquehanna, which is the question in this case, involves a federal power exceedingly intimate in its relations to the subjects of State sovereignty. The power to 'regulate commerce with foreign nations and among the States, and with the Indian tribes, cannot stop,' (says Marshall, C. J.) 'at the external boundary line of each State, but may be introduced into the interior. It comprehends navigation within the limits of every State in the Union, so far as that navigation may be in any manner connected with commerce, either foreign or interstate, and may therefore pass the jurisdictional lines of the States, and act upon the very waters to which State legislation applies.'

Gibbons v. *Ogden*, 9 Wheat. 1.

"But while thus asserting the great extent of the federal power, the opinion concedes to the State an 'immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are competent parts of this mass.' These, and others not enumerated, constitute police powers,

such as are exercised in the passage of laws to promote the peace, safety, good order, health, and the interests of the State, and are protected by the 9th and 10th Articles of the Amendments to the Constitution of the United States. 'The powers reserved to the States' (says the 45th number of the Federalist) 'will extend to all the objects which in the ordinary course of affairs concern the lives, liberties, and property of the people, and the internal order, improvement, and prosperity of the State.' Or, as said by McLean, J., 'all powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the States and the people.'

New Orleans v. *United States*, 10 Pet. 737.
And see *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Id. 245.
License Cases, 5 How. 582, 583, 592.

"But though this large field of State power is conceded, a difficulty arises sometimes in relation to its subjects, when they become the objects of the exercise of the federal power also. Thus says Mr. Story, in his work on the Constitution: 'A State may use the same means to effectuate an acknowledged power in itself which Congress may apply for another purpose. Congress itself may make that a regulation of commerce which a State may employ as a guard for its internal policy, or to preserve the public health or peace, or to promote its peculiar interests.' An illustration will be found in the case of

Wilson v. *Blackbird Creek Marsh Co.*, 2 Pet. 245,

in which the authority of a law of Delaware was questioned. The plea stated the creek to be a navigable highway, in which tide ebbed and flowed, and the argument insisted that the law of the State conflicted with the power to regulate commerce. But its validity was sustained, on the ground that the erection of the dam was necessary for the benefit of the citizens of Delaware, and not opposed to any law of Congress, none having been passed to regulate such streams; and in the expressive language of Chief Justice Marshall, it was not repugnant to the power to regulate commerce in its dormant state. This distinction in regard to the exercise of the power by Congress, is important as coming from the distinguished author of the opinion in *Gibbons* v. *Ogden*, sometimes quoted to carry the power of Congress further than it was intended by him to advance it—to the extent, indeed, of holding that a State cannot exercise its power over a subject within the power to regulate commerce, whether Congress has legislated on the same subject or not. This opinion is not sustained by the case cited from 2 Peters, or later authorities, and is strongly combated by Chief Justice Taney in

The License Cases, 5 How. 578, *et seq.*,

who refers to that case and others to show that it was not the opinion of Chief Justice Marshall that the mere grant of a power to the general government is to be construed as an absolute prohibition to the exercise of any State power over the subject of it. The question may be considered as now set-

tled in conformity to the opinion of Chief Justice Taney, by the case of

Cooley v. *The Board of Wardens of Philadelphia*, 12 How. 318,

which holds the grant of the power to regulate commerce is not exclusive, but that the question in each case depends on the character of the subject, some requiring it to be treated as exclusive and others not so. Opinion of Curtis, J.

But, without standing on what some may regard as debatable ground, it seems to be clear that when a State exercises her own sovereign power in a matter involving the interests of her citizens, though it may touch upon a subject within the field of the power to regulate commerce, it is not for that reason invalid if it conflicts with no law Congress has passed upon the same subject. Thus, pilot laws, though regarded as directly affecting a subject of commerce have been held to be valid."

Cooley v. *Board of Wardens*, 12 How. 299;
Pacific Steamship Co. v. *Joliffe*, 2 Wall. (U. S.) 450.

In the case of

Texarkana and Fort S. Ry. Co v. *Parsons*, 74 Fed. Rep. 408,

a railroad bridge crossing Red river was held to be an obstruction, merely because the plans thereof were not submitted to the secretary of war, in accordance with the statute, and it had not been constructed precisely in accordance with the explicit requirements of Congress. The Court's at-

tention is also called to the opinion of the attorney general, rendered in the very case under consideration, which is as follows:

"Department of Justice,

"Washington, D. C., Sept. 24, 1894.

"*The Secretary of War* --Sir: I have the honor to acknowledge the receipt of the letter of the acting secretary of war inquiring whether or not the North Bloomfield Gravel Mining Company, of California, falls within the jurisdiction of the California Debris Commission, under the act of Congress, approved March 1, 1893, and entitled 'An act to create the California Debris Commission, and regulate hydraulic mining in the State of California'; and inquiring also, whether, in view of the fact that the said mining company has never made application to the said commission for license to operate, as required by the terms of said act, the commission has 'authority to enter upon the premises for the purpose of inspecting or supervising the operation of the mine, or performing any of the duties devolved by the said act upon the commission in respect thereto; and if it has that authority, and is forbidden by the said company to enter upon its premises for that purpose, by what means can the commission enforce its said authority?

"In reply I beg leave to state that in my opinion there is no reason why the company mentioned should not come equally with any other company or individual engaged in hydraulic mining within

the jurisdiction and under the authority of the commission. The claim of the company, that under the decision of the Circuit Court of the United States for the Northern District of California, in the case of the United States v. the same company (53 Fed. Rep. 625, dated October 5, 1892), the defendant was removed beyond the provision and operation of the law creating the commission, I deem utterly untenable. At the time of the trial and decision of the case mentioned, that law was not in existence, consequently it could not have been construed or the extent of its operation defined by the Court. Moreover, the decision referred to was only to the effect that an injunction to restrain hydraulic mining by the defendant should be denied for the reason that there was not sufficient showing of damage to the navigability of public waters. But, whatever might have been the status of that company prior to the enactment of the debris law, that law has become operative upon it as well as upon all others conducting the business of hydraulic mining; and this company, if engaged in such hydraulic mining, and without license, is doing so in violation of law, for it is provided by section nine (9) of said act (27 Stat. p. 508): 'That the individual proprietor, or proprietors, or in the case of a corporation, its manager or agent appointed for that purpose, owning mining ground in the territory in the State of California mentioned in section 3 hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition setting forth such facts as

will comply with law and the rules prescribed by said commission.'

"The right of the commission to enter upon the lands of the company where such mining is being, or is supposed to be, unlawfully conducted, seems entirely clear, under the provisions of section 5 of said act. This section, after directing that the commission shall make examinations and surveys to determine the practicability, utility, etc., of the storage sites for debris, reservoirs, etc., to aid in the improvement and protection of the rivers within its jurisdiction, and to that end, preventing, amongst other matters, deposits of debris, resulting from mining operations declares that the commission shall * * * 'investigate such hydraulic and other mines as now are, or may have been, worked by methods intended to restrain the debris and material moved in operating such mines, by impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as sound experience and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid.'

"By section 10 of said act it is provided 'That said commission, or a committee therefrom, or officer of said corps assigned to duty under its orders, shall, whenever deemed necessary, visit said territory and all mines operated under the provisions of this act.' * * * By section 22 of this act, hydraulic mining contrary to the provisions of the

act, to the injury, direct or indirect, of navigable waters, is made a misdemeanor, punished by fine and imprisonment; while by section 5 the power to investigate mines is given in relation to those that 'are now or may have been' worked. I think that the law intended thus to give to the commission ample means for ascertaining the method of conduct of the mining industry, with a view to the protection of the navigable waters concerned, and the punishment of violators of the law, and that such means necessarily include the right to enter upon and inspect premises even at the present time.

"I am unable to find in the act in question any provision for the enforcement of the right of the commission to enter upon lands for the examination of mines; and in the absence of such express provision, am of the opinion that the preferable course would be the filing of a bill in equity, alleging (amongst other and usual matters) that the company is conducting hydraulic mining, without license and without application for license, and, as believed, to the injury of navigation of the streams; that the commission desire to investigate concerning the method of mining, construction of reservoirs, etc., and to that end have attempted to enter upon the land, but have been denied admittance; the prayer of the bill to be for an injunction to prevent the defendants from preventing the entry of the commission, and for injunction restraining the defendants from mining during the

time the commission is excluded from it, and pending the investigation.

"Respectfully,

"RICHARD OLNEY,

"Attorney General."

We believe the reasoning of the Court in the cases which we have quoted and cited amply sustains the foregoing opinion of the attorney general, and establishes our contention that Congress had constitutional authority to pass the act in question, and to prohibit to certain industries, except under certain conditions, even *the use* of the navigable waters of the United States, especially where such use does eventually tend to work injury to them. Mining cannot be carried on by the hydraulic process in the territory drained by the Sacramento or San Joaquin river systems without the ultimate use of either of these rivers and some of their navigable tributary streams, for a territory drained by a stream, in the sense of this statute, has such stream as the outlet for its waters, such as are employed in hydraulic mining; and Congress has, in effect, declared that such use is an injury to them, except it be exercised under certain conditions. The question of any present ostensible injury susceptible of proof to a Court's satisfaction, as distinguished from the use of the navigable waters, cuts no figure in the construction of the act, in our belief, except in its criminal features. By the passage of the Caminetti Act, Congress has virtually declared that the hydraulic mining carried on by the

North Bloomfield Company is injurious and creates an obstruction to the streams so used, except when certain limitations and conditions are observed. Appellant's counsel admits (Brief, p. 27),

> "That Congress can control commerce and navigation on the navigable portions of the Sacramento river and its tributaries * * * Congress also has power to prevent the obstruction of navigable streams, or interference with interstate or foreign commerce."

See further Dana Lumber Co. v. Jackson, C. decision by De Haven J. February 21-1898

Therefore, as we have seen that Congress has the power to determine this fact, either by itself or its duly authorized officers or agents, it necessarily follows that no objection to the constitutionality of the act can have any force. A decision in favor of our contention upon this branch of the case clears the way for an ultimate decision in appellee's favor.

IV.

The Act in Question is Mandatory and not Merely Permissive.

Failing, as it must, in showing that there are any constitutional objections to the act under consideration, appellant next seeks to take away all of its life and force by contending for a construction of section 9 that would, if

established, make the law of no value whatever for accomplishing the objects that Congress had in view in passing it. Counsel would have the Court believe that the act was passed, not by way of a compromise between the conflicting farming and mining interests, which the history of the times tells us was the motive for its enactment, but was intended to act wholly in the latter's behalf. He says the hydraulic miner has the option whether or not to comply with sections 9 and 10 of the Act; in other words, that the term "must" in the former section should be construed as if "may" had been employed.

It is a familiar rule of statutory construction that *when a power for public purposes is conferred, a duty arises to execute that power.* As was said in the early case of

Rex and Regina v. *Barlow*, 2 Salk. 609,

> "Where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall'; thus, 23 Hen. VI says the Sheriff *may* take bail; this is construed he *shall*, for he is compellable to do so. (Carthew, 293.)"

In other words, where a duty is enjoined or a public right is given or involved, the word "may" is frequently construed to mean "must" or "shall"; otherwise the right would be defeated. But, as the Supreme Court of the United States said, in the case of

Minor et al. v. *The Mechanics' Bank of Alexandria*, 1 Peters, 47:

"The argument of the defendants is that 'may' in this section means 'must'; and reliance is placed upon a well-known rule in the construction of public statutes where the word 'may' is often construed as imperative. Without question, such a construction is proper in all cases where the Legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject further than that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the Legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions."

See, further,

Mason et al. v. *Fearson*, 9 How. 247.

Adriance v. *Supervisors etc.*, 12 How. Pr. 224.

Newburgh Turnpike Co. v. *Miller*, 5 Johns. Ch. 101.

Hagadorn v. *Raux*, 72 N. Y. 583.

But the converse of the rule we have stated, i. e., that "must" is here equivalent to "may," and is directory or permissive only, not mandatory, is not true, and finds no support in any adjudged cases. To say that a thing *may* be done is to say that it may not be done at all, and hence there is little use of saying anything about it except in these cases where privileges are conferred. The Act before the Court imposes a duty upon the miner of a hydraul-

ic mine. He *must* comply with its provisions. He *must* file a petition. To say that he *may* do these things is to defeat the purpose of the act. To say that a hydraulic miner *may* mine without complying with its provisions is to make it a nullity. He *must* either file his application and obtain a permit or cease mining.

The authorities cited by appellant do not sustain his contention, and we believe that no case can be found holding that where rights are involved, as in the present instance, "must" is to be construed as "may." Such a construction would nullify the act.

We have examined all except one of the cases cited by the learned counsel for appellant to sustain his contention that the word "must" in section 9 of the act should be here construed as "may," and none of them bear out his theory. In the case of

Spears v. *The Mayor etc.*, 72 N. Y. 442,

the Court considered that the section of the law there under examination containing the term "must" was simply, and only intended as, a codification of a former law, giving the Court discretion in allowing a litigant to file a supplemental pleading, and therefore should be so construed, although the word "may" had been changed to "must."

In the case of

Wallace v. *Feely*, 61 How. Pr. 225, affirmed without opinion in 88 N. Y. 646,

the Court of Common Pleas of New York City considered the term "must" was more imperative than "shall"; and

in holding that as a former statute in *pari materia* had been considered merely directory by former decisions, in order to follow its former rulings upon the old law, the substitution of "must" for "shall" in that instance was unimportant, said:

> "As verbal alterations occur frequently in the new code without apparent reason, the change in question loses much of its significance."

In

Merrill v. *Shaw*, 5 Minn. 113,

the Court held that "must" should not be considered to be an absolute and inflexible mandate upon the Court" because the context there showed plainly that it was not intended to be so interpreted.

The case of

Fowler v. *Perkins*, 77 Ill. 271,

offers no consolation to appellant, and in

Wheeler v. *Chicago*, 24 Ill. 105,

the Court said:

> "The word 'shall' may be held to be merely directory, where no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual by giving it that construction; *but if any right to any one depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit.* But where no right or benefit to anyone depends upon the imperative use of the word it may be held to be directory merely."

Th right of the United States, in the case at bar, depends upon giving the word "must" in section 9 of the Caminetti Act an imperative construction.

The case of

R. R. Co. v. *Hecht*, 95 U. S. 168–170,

involved the interpretation of the term "shall" in a State statute prescribing a method of service of summons upon a corporation, where subsequent legislation provided other means of such service. The Supreme Court held that, in view of such subsequent legislation upon the same subject and because of the rule of law that "as to remedies, * * *legislative power of change may be exercised when it does not affect injuriously rights which have been secured," the term "shall" in the old law should be considered as reading "may," in order to give the subsequent act force and effect.

Is it not more rational to hold that the Saxon word "must" is ordinarily used in the statute to place beyond doubt or cavil what is intended? It is more imperative than "shall," and has not yet been twisted like the words "may" and "shall" into meaning something else.

Eaton v. *Alger*, 57 Barb. (N. Y.) 179–190.

Webster defines the "must" thus:

"1. To be obliged; to be necessitated; expressing either physical or moral necessity; as a man

must eat for nourishment; we *must* submit to the laws. 2. To be morally required; to be necessary or essential to a certain quality, character, end, or result; as he *must* reconsider the matter; he *must* have been insane."

V.

The Question of Damage to the Navigable Streams, Under the Act in Question, is not for the Courts to Determine.

Appellant next contends that unless damage to the navigable streams can be judicially proven, a Court of equity cannot enjoin the Company from using them. It says, in effect: Prove that the navigable waters are being damaged by us before you are entitled to an injunction restraining us from using them! Manifestly, if it were shown that a hundred hydraulic mines were each pouring "flocculent matter" into a stream, it would be well nigh impossible to single out any of them as appreciably damaging it. We contend the use of the stream in the manner admitted by the answer, is of itself an injury in the eye of the law, whether it perceptibly or imperceptibly damages it. Appellant qualifies its denial of damage by admitting use. This, we contend, is an admission of injury; and counsel for appellant forgets that the Supreme Court of the United States has said in

South Carolina v. *Georgia*, *supra*,

that for the purpose of regulating commerce the navigable streams are the public property of the nation. Anything

that affects the streams affects commerce upon them and the Government's right of property in them. Even if an act be a criminal offense, still if it invades property rights, the act may be enjoined.

Many of the authorities cited by appellant's counsel upon this branch of the case are found in High on Injunctions, and in the last edition are found some which they did not cite, bearing on their contention.

But Mr. High, in citing these cases states the rule correctly, and says:

> "The subject matter of the jurisdiction of equity being the protection of private property and of civil rights, Courts of equity will not interpose for the punishment or prevention of merely criminal or immoral acts unconnected with violations of private rights. Equity has no jurisdiction to restrain the commission of crimes, or to enforce moral obligations, and the performance of moral duties, nor will it interfere for the prevention of an illegal act merely because it is illegal, and in the absence of any injury to property rights, it will not lend its aid by injunction to restrain the violation of public or penal statutes, or the commission of immoral and illegal acts."
>
> *High on Injunctions*, 3 Ed., p. 19, Sec. 20.

But it must be evident that the authorities cited by the counsel for defendant have no application to the case before the Court. It is not sought to restrain an im-

moral act or an offense, merely, but an act injurious to the rights of the appellee, and which appellant has no moral or legal right to exercise.

Mr. Pomeroy states the rule:

> "In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any question, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side. The general principle may be stated as follows: Whenever a right exists or is created by contract, by the ownership of property, or otherwise, cognizable by law, *a violation of that right will be prohibited,* unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise.* The jurisdiction of equity to prevent the commission of wrongs, however, is modified and restricted by considerations of expediency and of convenience which confine its application to those cases in which the legal remedy is not full and adequate. Equity will not in-

terfere to restrain the breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction."

3 Pomeroy's Eq. Jur., Sec. 1338.

Here, of course, damages would not be an adequate remedy, and as appellee's rights are violated, it is entitled to an injunction. This principle is illustrated in many cases.

Riparian proprietors of a private stream are entitled to use and enjoy the stream without diminution or alteration, and will be protected by injunction from violation of their right.

Brown v. *Ashley*, 16 Nev. 311.
Society v. *Lowe*, 2 C. E. Green, 19.
How v. *Norman*, 13 R. I. 488.
Bitting's Appeal, 105 Pa. St. 517.
Heilbron v. *Canal Co.*, 75 Cal. 426.

A riparian proprietor is entitled to an injunction to restrain the unlawful diversion of the waters of a stream adjoining his land, although the injury caused by the diversion is incapable of ascertainment or of being estimated in damages.

Heilbron v. *Canal Co.*, *supra*.

A party claiming a certain quantity of the waters of the stream adversely to the riparian proprietor, under an unlawful appropriation thereof, cannot justify his diversion by showing that there was no appreciable difference in the quantity of the water flowing in the stream at a time when he took the water and at a time when he did not.

Heilbron v. *Canal Co.*, *supra.*
See also *Lux* v. *Haggin*, 69 Cal. 255.

The owner of lands through which flows a non-navigable stream may restrain a person from floating logs down the stream, which results in a continuous trespass on plaintiff's premises.

Haines v. *Hall*, 17 Or. 165.

In actions for the diversion of water, when there is a clear violation of an established right, and a threatened continuance of such violation, it is not necessary to show actual damages or a present use of the water, in order to authorize a Court to issue an injunction and make it perpetual.

Brown v. *Ashley*, 16 Nev. 311.

In *Corning* v. *Troy I. & N. F.*, 40 N. Y. 206, the court said:

> "No man is justified in withholding property from the owner when required to surrender it, on the ground that he does not need its use. The

plaintiffs may do what they will with their own. Upon established principles this is a proper case for equity jurisdiction. First, upon the ground that the remedy at law is inadequate. The plaintiffs are entitled to the flow of the stream in its natural channel. Legal remedies cannot restore it to them and secure them in the enjoyment of it. Hence, the duty of a Court of equity to interpose for the acomplishment of that result. A further ground requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid, the only remedy of the plaintiffs, whose rights have been established, will be to commence suits from day to day, and thus endeavor to make it for the interest of the defendant to do justice by restoring the stream to its channel. If the plaintiffs have no other means of recovering their rights, there is a great defect in jurisprudence. But there is no such defect. The right of the plaintiffs to equitable relief sought is established by authority as well as principle."

A Court of equity has power to restrain by injunction the disturbance of a right held by a landowner to have an artificial watercourse flow into his land from a neighbor's land.

Bitting's Appeal, Supra.

An unreasonable use or detention of water by defendant operating a saw-mill upon a stream affords sufficient

ground for an injunction as a violation of plaintiff's easement in the stream.

Pollitt v. *Long*, 58 Barb. 20.

Equity will protect the enjoyment of a right of way over a street, alley, or road by restraining the erection of obstructions thereon.

Nicholls v. *Wentworth*, 100 N. Y. 455.
Roman v. *Strauss*, 10 Md. 89.
Gorton v. *Tiffany*, 14 R. I. 95.
Devore v. *Ellis*, 62 Tex. 505.

"The violation of franchises or special privileges conferred by legislative authority, either upon individuals or upon corporations, affords frequent occasion for invoking the extraordinary aid of equity by way of injunction to remedy evils which the usual modes of redress in courts of law are powerless to mitigate or to prevent. The value of a franchise being generally dependent upon its exclusive use and possession, it may be protected upon the ground of the inadequacy of the legal remedy and the probability of thus avoiding a multiplicity of suits."

2 *High on Injunctions*, 3d ed., sec. 897.

A water company that has the exclusive right or franchise of supplying water in a place may enjoin a rival company from interfering with such right.

Williamsport W. Co. v. *Lycoming G. & W. Co.* 95 Pa. St. 35.

An exclusive right of fishing in a river may be protected by injunction.

Ashworth v. *Crowne*, 10 Ir. Ch. 421.

"Frequent instances of the interference of equity to prevent the violation of a franchise occur in the case of roads, as where the exclusive right to control and operate a highway turnpike, or other road, has been granted to individuals or corporations. Thus, where complainant's road is incorporated under an act of Legislature which provides that no other road shall be constructed within thirty years after the passage of the act, the act being held constitutional, is regarded as creating a contract with the corporation and an injunction will be allowed against the operation of a rival road. And although such injuries to a franchise as call for the interposition of equity and the granting of an injunction are generally in the nature of nuisances, and although the jurisdiction of equity over such cases partakes largely of the nature of the jurisdiction in restraint of a nuisance, yet the relief may be granted where the injury to the franchise is purely a trespass, if the remedy at law is inadequate. And the destruction of toll-gates and preventing the collection of tolls, although a trespass, is such a one as cannot be adequately compensated in damages in an action at law, and it will therefore be enjoined in equity."

2 *High on Injunctions*, 3d ed., sec. 912.

Equity will prevent interference with the right to maintain a bridge and collect toll.

2 *High on Injunctions*, sec. 917.

"The right to maintain a ferry being a franchise whose value lies in its exclusiveness, equity may enjoin an unauthorized interference with or interruption of such right upon the ground of preventing a multiplicity of suits."

2 *High on Injunctions*, sec. 926.

The Wisconsin case, extensively quoted by appellant's counsel in his brief,

The City of Janesville et al. v. *Carpenter*, 77 Wis. 288,

is not, we submit, here applicable.

It will be noticed that this was an action in which the city and the Janesville Cotton Mills sought to enjoin the defendant from building upon his own land, which was the bed of a stream to which he had acquired a title in fee *usque ad filum aquae*, in such a manner as not to injure the property or rights, public or private, if any one else. There was no allegation in the complaint of injury but it was complained that the example furnished by the defendant might be followed by others, and thereby certain speculative or problematical damages might ensue to the interests of the city and its inhabitants. The Court said:

"The action does not involve any question of obstruction or injury to navigation, or of injury to

any public right. Many of the consequences to the city predicted would follow as well the erection of said building outside of the river. The complaint does not show that the proposed building would be a private or a public nuisance. The action is based upon the allegations of anticipated injury to the respective plaintiffs which ought to be prevented by injunction. It is a private and not a public action. * * * In respect to injury to any interest that the city represents, the complaint is very obscure and defective. * * *The only injury to these interests that is alleged is from what somebody else may do in the future through the influence of defendant's example, and that is a mere prediction or conjecture. It is not shown how or in what manner such injury could occur. * * * It is not charged that the proposed building will in itself do any harm in any respect whatever, or that the defendant has not the right to build it where he proposes to build it, but that it may possibly be followed as an example by others in building buildings which may possibly do harm. It would be a new case where one had actually done something in itself right and harmless and he should be sued because others had done something wrong and injurious by following his example, and it would be a strange case to enjoin one from doing something right and harmless in itself, because others may possibly do something wrong and injurious by following his example, and yet the latter is the present case. A mere

example is not actionable. Such is the action in favor of the city."

The Court further remarked:

"The argument of the learned counsel of the respondent, and the authorities cited on the question whether the proposed building will obstruct the navigation of the river, are impertinent to the case. There is nothing in the case that involves any such question in the remotest degree."

It is therefore apparent that this case has no bearing upon the subject matter now pending. The case before the Court involves the unauthorized *use* of certain streams, whose protection and improvement is confided to the general government, and the consequent infliction of a public injury, which may or may not result on the part of this appellant company, in tangible, substantial damage to these streams. It is sufficient, we submit, to refer to the excerpts hereinabove given, to distinguish the case from that at bar.

Nor do the other cases referred to by the learned counsel upon this subject touch the real point at issue here. They undoubtedly state the law, but the trouble lies in their attempted application to the case at bar. There is no question but that a Chancellor will refuse to enjoin the commission or threatened commission of a crime or other unlawful act when not connected with the violation or invasion of a property right. Here, however, a property right is being invaded with irrepara-

ble consequences, and the government's only remedy lies in the granting of this application for equitable interference.

See further the cases referred to on pp 17-51 herein.

VI.

The Hydraulic Mining Interest.

In the Court below, it was said by counsel for the Mining Company that the Court, owing to the vast importance of the hydraulic mining interest, should not interfere to grant the relief prayed for in the complaint. It would be a sufficient answer to say that the government in this case only seeks to compel the company to comply with the express provisions of the statute. But even if there were no statute upon the subject, still whether the mining interest is important or not is an immaterial question. As a matter of fact, it is as nothing compared with the agricultural interest of the State. The mining interest is temporary—the agricultural interest is permanent. The mining interest benefits principally those engaged in the business. Upon the agricultural resources of the State depend the prosperity and perpetuity of the wealth of California. This contention, however, was made in the case of

> *Woodruff* v. *North Bloomfield G. M. Co.*, 9 Sawyer, 441,

and was answered by Judge Sawyer as follows:

> "A great deal has been said about the comparative public importance of the mining interests,

and also the great loss and inconvenience to those defendants if their operations should be stopped by injunction. But these are considerations with which we have nothing to do. We are simply to determine whether the plaintiff's rights have been infringed, and, if so, afford him such relief as the law entitles him to receive, whatever the consequences or inconvenience to the wrongdoers or to the general public may be. To similar suggestions, in *Attorney-general* v. *Council of Birmingham* where the sewage of the city, having a population of two hundred and fifty thousand, was the nuisance complained of, the vice-chancellor said: 'Now, with regard to the question of plaintiff's right to an injunction, it appears to me that so far as this Court is concerned, it is a matter of almost absolute indifference whether the decision affects a population of two hundred and fifty thousand, or a single individual carrying on a manufactory for his own benefit. I am not sitting here as a committee of public safety, armed with arbitrary power to prevent what, it is said, will be a great injury, not to Birmingham only, but to all England; that is not my function.'

4 Kay & J., 539.

See also *Stokes* v. *Bandury Board of Health*, 1 R. L. Eq. Cas. 57.

"So in *Attorney General* v. *Colney Hatch Lunatic Asylum*, the Lord Chancellor observes: 'It is said unless the defendants are permitted to throw all their sewage upon their neighbors' lands, upon

which they have no more right to throw it than into this Court, they cannot carry on the Asylum (which contains two thousand two hundred patients); and therefore they contend that they must be permitted to dispose of the whole of the sewage on their neighbors' lands. Surely, the mere statement of the proposition is quite sufficient to refute it. Nobody can suppose the law of England to be in that state. It is not to be supposed that, because we are told, as I was told in the case of *Attorney General* v. *Birmingham*, that three hundred thousand people will be very much inconvenienced if they are not allowed to use their neighbors' property without paying for it, that on that account they are to use their neighbor's property without paying for it. This Court has merely to decide what the law is as it exists, and to see that it is duly administered; not to order anything done that is impossible, as in the illustration I have given, *but to take care, subject to that modification that persons shall be restrained from exercising with a high hand powers which they have no right in law to exercise.*'

4 L. R. C. App. Cas. 155.

"In these cases the acts causing the nuisances were urged as absolutely necessary to the safety of the people interested—to three hundred thousand people, in the case of the city of Birmingham—but the defendants were plainly informed that it was not the duty of the Court to point out how the nuisance should be avoided, but that, however

necessary to the safety or convenience of those interested in the continuance, they must find a way to prevent the nuisance, or cease to perform the acts which occasioned them. Certainly the law is not less favorable to the protection of the rights of every man, under the several express constitutional restrictions before referred to in this country, than it is in England, where there are no such limitations on the legislative power. And authority is not wanting to the same effect in our own reports. In

Weaver v. *Eureka Lake Co.*, 15 Cal. 274,

the Court said: 'It is contended that, under the circumstances, the erection of the dam was justifiable and proper, and that the great value of the lakes as reservoirs is a sufficient justification for the injuries resulting to plaintiff. We are aware of no principle of law upon which such a position can be maintained. A comparison of the value of conflicting rights would be a novel mode of determining their legal superiority.' And in

Wixon v. *The Bear River etc. Co.*, 24 Cal. 373,

the Court, said: 'The four remaining instructions refused by the Court are founded upon the theory that, in the mineral districts of this State, the right of miners and persons owning ditches constructed for mining purposes, are paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition; thus annihilating the doctrine of priority in all cases where the contest is between

a miner or ditch-owner, and one who claims the exercise of any other kind of right, or the ownership of any other kind of interest. To such a doctrine we are unable to subscribe, nor do we think it clothed with a plausibility sufficient to justify us in combating it.' But authority is not necessary on so plain a proposition. Of course, great interests should not be overthrown on trifling or frivolous grounds, as where the maxim, *De minimis non curat lex*, is applicable, but every substantial material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests, that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all smaller and less important enterprises, industries, and pursuits, would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public would be arrested in its incipiency.

"But if the comparison could be made in this instance, it would be impossible to say that the interests of the defendants, and of those engaged in the same pursuits, would be more important than those of complainant, and such as he represents in this contest. The direct contrary is maintained by complainant with great force and plaus-

ibility. But we have nothing to do with this question as to the comparative importance of the conflicting interests or the inconvenience to the defendants by the stoppage of their works, if they infringe the material substantial rights of others.

"It is the province and imperative duty of the Court to ascertain and enforce the legal rights of the complainant, no matter what the consequence to defendants may be. This duty no Court could evade if it would."

In the same case, Judge Deady said:

"I am by no means unconcerned or indifferent to the effect of this decision upon the large capital invested in these mines. But it is a fundamental idea of civilized society, and particularly such as is based upon the common law, that no one shall use his property so as to injure the right of another. *Sic utere tuo ut alienum non laedas.* From this salutary rule no one is exempt—not even the public—and the defendants must submit to it. Without it the weak would be at the mercy of the strong, and might make right."

VII.

Necessity of Determining Sufficiency of Impounding Works.

In every hydraulic mining case that has come before the Courts it has been claimed with the utmost confidence by the hydraulic miners, that their mining opera-

tions produced no injury. The fact was indisputable, however, that injury to the streams was caused by some one, and the miners have not been slow in many instances to fasten this blame upon somebody else. But the Courts investigated the circumstances, and after full examination have determined that hydraulic mining is the source of injury to the navigable rivers of the State of California in the territory in which hydraulic mining is carried on. Even where the injurious effects of hydraulic mining have been conceded the question as to how these injuries might be obviated has always led to wide discussion and difference of opinion. Eminent engineers have differed upon the sufficiency of restraining works. Naturally the hydraulic miner is desirous of expending as little money as possible, and his views as to the sufficiency of his works are always in conflict with those who are opposed to him in interest. It was for the purpose of passing upon the sufficiency of restraining works that, acting as government experts in the matter, the board of engineers provided for by the act of Congress was appointed. It is practically impossible for a Court to pass upon a question involving the sufficiency of dams, Engineers of the widest experience differ on this subject, and where experts disagree, who shall decide?

As illustrating these views, we might call the attention of the Court to the language of Judge Sawyer, in the case of

Woodruff v. *North Bloomfield G. M. Co.*, *supra*, p. 537,

as follows:

"As is usually the case, the views of different engineers and experts distinguished in their profession, differ widely upon the point of practicability and safety. The larger number of witnesses called, and much the larger amount of testimony in this case, so far as mere opinion goes, are, doubtless, in favor of the practicability, *if sufficient means are furnished.* But all the practical experiments heretofore made, at great expense, under the supervision of the State, and of competent engineers, have been lamentable failures. The dams constructed were, doubtless, in many particulars defective. But what guaranty has the Court, and those whose lives and property are at stake, that any future works of the kind will not also be defective? As at present advised, with some knowledge of the tremendous force of Nature, we cannot undertake to say, upon the mere opinion of experts generally at variance, as in this case, however competent, that the scheme would be practicable and safe. We cannot define in advance what works shall be sufficient, and authorize the continuance of the acts complained of upon the peformance of any prescribed conditions. In view of the past experience here and elsewhere with the damming up of waters, and of the wide difference of opinion of competent engineers on the subject, it is clear that *we should not be justi-*

fied in an attempt to prescribe in advance any kind of a dam under which a large community shall be compelled to live, in dread of a perpetual, seriously alarming, and ever present, menace."

Judge Deady, in the same case said:

"Besides, it is a very serious question in my mind whether any person or community can or ought to be required to submit to the continuous peril of living, under or below such a dam as this must necessarily be, if it is made high enough to impound the coarse material; and this, merely for the convenience of another person or persons in the pursuit of his or their private business. It may be likened, at least, to living in the direct pathway of an impending avalanche."

In the later case of

Hardt v. *Liberty Hill Con. M. & W. Co.*, 11 Sawyer, 61,

the Court said:

"In the face of the conflicting views of engineers on the subject, it is impossible to be satisfied of the sufficiency of this dam. The whole matter rests in mere opinion. We have no right to blindly speculate upon matters of such consequence. With our limited faculties, we cannot foresee, with reasonable certainty, what may occur in these mountain rivers, confined in deep canyons, which sometimes become irresistible torrents.

"Nothing short of the attribute and prescience

of omniscence is equal to the task of determining the absolute sufficiency of such a dam, and nothing should be accepted as sufficient, except upon the most indisputable and demonstrative evidence. Where the earth and other material displaced in mining are removed from their bed, and cast into the main rivers in the mountains, they at once become subject to the operation of the tremendous forces of Nature, against which the puny efforts of man can interpose but feeble barriers; at best, can accomplish but little. A small beginning arising from slight causes, originating in accident or design or from the active forces of Nature, may soon develop into a destructive breach in a dam like that in question. Malice may instigate the application of dynamite, and the blowing up of the dam, as was claimed by the owners to be the case—although it is not a known fact—with the English dam some three years ago, and is now claimed with respect to the debris dam in Humbug Canyon. The English dam had been constructed with the highest degree of engineering skill, by parties whose highest interests required that it should be absolutely sufficient and safe under all contingencies; yet, through accident, malice, the forces of Nature, or some other cause unknown, it gave way, and precipitated its destructive flood of water, in ten hours, upon the plains eighty-five miles distant below, breaking in several places, where the water channel was more than a mile wide, levees that had withstood the

ordinary floods of the rainy season, and doing great damage to the surrounding country.

Debris Case, 9 Sawyer, 484; S. C. Fed. Rep. 766.

"The lamentable failure of the State in building debris restraining dams under the direction of its own engineers, after an expenditure of half a million of dollars, and the equally unsuccessful efforts of private mining companies shown in the

Debris Case, 9 Sawyer, 480; S. C. 18; Fed. Rep. 763, furnish a warning against relying too confidently upon the skill or opinions of engineers, however eminent. The restraining and impounding dams erected by the State, whose interest itwas to make them suffiicient, were in the plains, on comparatively low grades. That of the English dam,doubtless, was in a more difficult position, and was a water dam merely. These were on a larger scale, it is true, and, possibly, some of them in more dangerous positions, than the present one; but, if so, it is only a difference in degree. The same principles of physics and dynamics underlie and control and govern them all. It is not for us, with our limited faculties, to estimate and speculate upon its possibilities, and measure off and lay down a line indicating just how far trespassers may encroach upon the domain of overpowering forces of Nature, within the supposed limits of reasonable possibility or probability, with safety to the rights of the parties below upon whom the trespasses are committed. A Court having power

to enjoin the nuisance might, with just as much propriety, refuse an injunction against the erection by the owner on his own premises of a magazine for the storage of gunpowder and dynamite, adjoining and next to his neighbor's house, upon the evidence of experts in the matter that the magazine is constructed with the most perfect skill, and that it is and will be guarded by all the means for securing safety known to science. Such a magazine might never explode, yet it is liable to explode at any moment. And the same would be true of one of those restraining debris dams, built across one of those main mountain rivers, liable to become roaring torrents. It might not give way for years, yet it is liable to do so at any time during a flood.

"If restraining dams must be relied on by the inhabitants of the valleys of California to protect them from destruction from mining debris, it would seem that such dams should be conconstructed by or under the supervision, and in accordance with the ideas of the parties in danger and liable to be injured, rather that under the supervision and according to the views, of those who commit the trespasses and perform the acts which give rise to the danger and whose interests are not endangered, or in any respect liable to suffer. The party in danger should be the party to determine the measure of his protection—not the party creating the danger for his own benefit.

"It is for the pecuniary interest of hydraulic miners to get out as much of the precious metals as possible, with the least possible expense. The interests of the moving party in this matter are simply to tide over the present, and escape injunctions until its mines can be worked out. What happens afterwards is no concern of his. As human nature is constituted, the action of parties so situated, set in motion by an application of the coercive powers of the law, in the erection at their own expense, and according to their own ideas, of impounding dams for the sole protection of the rights of those upon whom they commit trespass, should be scrutinized with jealous care by those who administer the laws, and whose imperative duty it is to see that each man shall so use his own as not to injure his neighbor. It may well be doubted whether any restraining dam, however constructed, across the channels of the main mountain rivers, of a torrential character, should be accepted by the Courts as a sufficient protection to the occupants of land in the valleys below liable to be injured. But if any are to be accepted, they should only be those the ample sufficiency of which has been established upon testimony of the most unquestionable and satisfactory character. Nothing should be left to conjecture. This is not a matter of a single dam. A rule must be laid down applicable to the entire gold bearing region. It will be no use to restrain one mine, if others are allowed to run. Besides, it would be unjust. All

doing injury must be stopped or restrained from contributing to further injury, or none."

VIII.

Importance of the Case.

We may, perhaps, with propriety, before closing, direct the Court's attention to the importance of the case at bar, which is due to the fact that it involves not only the right of the government to prevent injury to the navigable rivers of the State from the mining operations of the particular corporation before the Court, but it involves also the construction to be given to the act of Congress in relation to hydraulic mining throughout the northern part of California, and a determination whether that act will effectuate the purposes intended.

This is the first case that has arisen in which it has become necessary to construe the various provisions of this act of Congress. The argument of counsel for the appellant, that a vast amount of injury must be shown before it can be enjoined, defeats the very purpose attempted to be accomplished by this act. It requires no such legislation to enable the government of the United States to protect its navigable rivers from great injury. Before the passage of this act suits had been brought by the government of the United States, as well as by the various municipalities of the State of Califor-

nia, and private individuals, to restrain injury to the navigable waters and to the adjacent lands, caused by hydraulic mining. Unless this act confers some new right upon the government, or imposes some new duty upon those engaged in the business of hydraulic mining, it is simply a piece of waste paper. It was intended to impose new duties and obligations upon those engaged in the hydraulic mining process. Before its passage the government was compelled to go into court and to prove that hydraulic mining was carried on to the direct injury of the streams. In the act of Congress it is assumed as a question beyond dispute that hydraulic mining prosecuted in the regions named in the act must necessarily be productive of injury to the navigable waters of the United States. The question of injury Congress has not left open to dispute. It has determined that injury must result from the very nature of hydraulic mining. It recognizes the fact that works must be erected by which this injury may either be prevented or mitigated, and hence appointed a commission of its own engineers to determine this fact. Granted the power of Congress to legislate on the subject, and it follows conclusively that the appellant's position cannot be maintained. The answer admits all the material allegations of the complaint, and admits further that the appellant uses public navigable streams for the purpose of carrying matter from its mine. In other words, it expressly admits in Court by its pleading, that hydraulic mining debris moved in its

mining operations is deposited in the navigable waters of the United States and carried through their length into the bay of San Francisco. It says, in mitigation, that the matter it places in the river is "flocculent matter," and it draws the conclusion, to its own satisfaction, that flocculent matter produces no injury. Therefore, we have before the Court all the elements of injury and misuse which the act of Congress intended to prevent. If the Court should determine that the government is compelled to prove, in order to obtain relief, that this debris matter does injury, in the sense in which appellant uses the word, that is, produces palpable, physical damage, which must be traced to the mining operations of this particular mine, it would follow that the act of Congress is superfluous, because the government under these circumstances could have, and has proceeded, without such act of Congress.

In the cases tried before this Court several years ago, when there was no Congressional statute prohibiting hydraulic mining unconditionally, appellee was not compelled to prove that the particular miners thus sued produced the damage complained of. It was sufficient to show that they contributed in some degree to such damage. It may be that a stream of water would carry without injury the debris from one hydraulic mine, but it would be destroyed if loaded down with debris from a dozen similar mines. Hence, any person contributing in any degree to the in-

jury of the streams must be enjoined, and appellant expressly admits that it contributes at least to the extent of "flocculent matter."

Under the law of Congress it has no right to use the stream at all without permission of the commission.

The question involved in this case is whether the government of the United States can legislate so as to prevent navigable waters of the United States being used at all for hydraulic mining purposes. We claim that the government can absolutely prohibit the use of the streams in any degree for any purpose; for the transportation of flocculent matter, or any matter, and can determine upon what conditions it will allow the streams of the United States to be used, for the transportation of such matter. The navigable waters are to be used for commercial purposes. Their use for any other purpose can only be permissive. They are not intended as sewers to carry away the refuse of cities. They are not intended as conduits to carry away offal from slaughterhouses, or sawdust from sawmills; or coloring matter from dying works; or debris from hydraulic mines. We may concede, in this case, that the government has the power to permit its waters to be used for such purposes, but it has the right to impose the conditions upon which permission shall be granted. It has done so in the act before the Court. The government has said that it will permit hydraulic mining in the territory mentioned on the con-

pliance by the miners with certain conditions, and it will prohibit it when those conditions are not observed.

The act in question is not a harsh one proposed by a hostile interest, and ought not to receive a strict and narrow construction. It is an act that was proposed by the hydraulic miners themselves, who in convention assembled recognized that by the common law of the land they had no right to use the navigable streams of the State for any purpose. They recognized that under the common law, as defined by the Courts, hydraulic mining was absolutely prohibited, not because it was hydraulic mining, but because the conditions necessary for the prosecution of this industry were such that it was necessary to use the streams to carry away the refuse material of the mines. They met in mass convention; they appealed to the farming and agricultural interests, and said that they recognized the binding effect of the decrees of the Courts, and did not seek to avoid them; they thought, however, a plan might be devised whereby permission might be granted to mine with perfect safety to all. They proposed a plan whereby the question of whether they should mine or not should be left to an impartial commission of government engineers. They said, in effect, that they would no longer litigate in expensive trials the question of injury or no injury; they would concede that hydraulic mining must necessarily produce injury except in such cases where the necessary restraining works had been erected to the sat-

isfaction of the government engineers. The proposition they made met with a hearty second. It seemed a fair one, and those that had fought the most bitterly in the past were perfectly willing to submit the question of the use of the streams to a board of impartial government engineers.

The hydraulic miners themselves not only sought the passage of this law, but it seems to us are deeply interested in its maintenance. It is the only safeguard that they can claim to have for mining at all.

If, however, appellant's contention is correct, the Caminetti Act is meaningless and accomplishes nothing. Counsel would have us believe that the act was only designed to legalize the infliction of damage to the navigable streams, not to prevent it by intelligent and scientific methods. According to the appellant company's contention, if it believes it is damaging the streams, it can seek the aid of the commission to avoid the closing of its works by injunction, and the punishment of its officers criminally; but if it believes it is doing no perceptible damage, it can refuse to have the commission determine whether or not its impounding dams are sufficient—in fact, completely disregard that body, because the law, it contends, gives it the option whether or not it will submit to the commission. In other words, it is to be the province of the mining company, not of the Debris Commission, to determine whether or not the navigable streams are being

directly or indirectly injured by the hydraulic mining performed. To give the Caminetti Act such an interpretation, is to take from it all of its life and force, and render it, as we have observed, a meaningless statute. We submit the language of the act shows that this contention is at variance with the intention of Congress, and cannot be sustained.

The act of Congress operates, in effect, as an absolute injunction against all hydraulic mining which uses the navigable waters in the territory named in said act; but permits that injunction to be dissolved by application to the commission of government engineers. To place any other construction upon the act would be to say that the act did not do what it purports to do.

Section 8 specifically refers to the decisions of the Courts, and adopts the definitions made by them. It says that, for the purpose of this act, hydraulic mining, and mining by the hydraulic process, are declared to have the meaning and application given to said terms in said State. Judge Sawyer in the case of *Woodruff* v. *North Bloomfield Mining Co.*, clearly defines hydraulic mining.

There is some mining of this character carried on in the territory described in the act, the debris caused by which does not reach the river channels but is deposited in sloughs, and in some places is deposited upon lands bought and used solely for that particular purpose. It was the design of the act of Congress to reach every mine

where the debris from the mine in any way entered the river system.

Section 3 uses the words "directly or indirectly injuring the navigability of said river systems," showing clearly that Congress not only intended that the act of Congress should apply to such mines as directly placed their debris in the river systems, but also to such mines the debris from which might be liable to be carried into the river systems. There would be no occasion for the use of the word "indirectly" unless this was so. It is a matter of common knowedge that the debris from the hydraulic mines does not all at once enter the rivers, but by being washed into the canyons, it becomes subject to the power of water and gradually is forced into the river channels.

Section 5, in the last sentence, provides for exactly the conditions existing at the North Bloomfield mine. It says that it shall be the duty of the commission to investigate such hydraulic mines as are now or may be worked by methods intended to restrain the debris and material moved in operating such mines by impounding dams, settling reservoirs, or otherwise.

If this act of Congress does not take the whole question of hydraulic mining in the watersheds of the Sacramento and San Joaquin rivers, and place it under the jurisdiction of this commission so as to prevent it, where it in anywise affects the navigable rivers in such territory, what purpose does the act accomplish? It is unnecessary

for any man to obtain a permit from anybody to carry on a lawful occupation where he can do no injury.

Whether the injury came from hydraulic mining, or from the turning of the soil by agriculture or from sheep, whether the injury was small or great, whether the injury could be charged to any one hydraulic mine or not, whether or not Congress has authorized the use of the streams for the purpose claimed by the hydraulic miners, whether or not they had acquired easements to use the streams for that purpose, whether or not the magnitude of the industry should entitle them to special protection and consideration—were questions all elaborately argued by the most astute counsel in the State of California. The decisions of the Courts were uniform, and it was recognized by all that unless restraining and impounding works could be erected in every case where, by any possibility, the tailings could reach the streams, the topographical features of California were such, in the river systems mentioned in the act of Congress that hydraulic mining could not, under any circumstances, be prosecuted, and on this theory the act of Congress is framed. It allows hydraulic mining to be prosecuted by the permit of a government commission; it prohibits it in all other cases. The commission is the tribunal to determine, in any given case, so far as the government of the United States is concerned, whether or not the operation of any particular hydraulic mine produces injury to the navigable waters. This commission is a special tribunal, of limited juris-

It is therefore respectfully submitted that the decision of the Circuit Court should be affirmed.

SAMUEL KNIGHT,
Assistant United States Attorney,
For Appellee.

Robert T Devlin
amicus Curiae

No. 407

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BERNARD McGORRAY,

Appellant,

vs.

MYLES P. O'CONNOR, THOMAS CUNNINGHAM, C. K. BAILEY, E. F. BAILEY, ANDREW WOLF, R. GNEKOW, JOHN JACKSON, T. W. NEWELL, I. S. BOSTWICK, WM. INGLIS, AND MOSES MARKS,

Appellees.

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

INDEX.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD McGORRAY,
Plaintiff,

vs.

MYLES P. O'CONNOR, THOMAS CUNNINGHAM, C. K. BAILEY, E. F. BAILEY, ANDREW WOLF, R. GNEKOW, JOHN JACKSON, T. W. NEWELL, I. S. BOSTWICK, WM. INGLIS, and MOSES MARKS,
Defendants

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California:

Bernard McGorray, of Chicago, and a citizen of the State of Illinois, brings this his bill against Myles P. O'Connor, of San Francisco, and a citizen of the State of California, and Thomas Cunningham, C. K. Bailey, E. F.

Bailey, R. Gnekow, Andrew Wolf, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, all of Stockton, California, and all citizens of the State of California.

And thereupon your orator complains and says that for many years previous to the 22d day of Jan. 1884, C. K. Bailey and C. W. Carpenter were general partners in farming and stockraising in the county of San Joaquin, State of California, under the firm name of Bailey and Carpenter.

That on the date last aforesaid the said Carpenter died in said county, and left an estate therein, which consisted largely of his undivided one-half interest in said partnership property of Bailey and Carpenter.

That afterward said C. K. Bailey filed in the office of the clerk of the Superior Court of said county a paper purporting to be the last will and testament of said C. W. Carpenter, deceased, in which the bulk of his property was given to the children of said C. K. Bailey, to the exclusion of his heirs at law.

That said C. K. Bailey was named therein as the executor of said alleged will, without bonds.

That afterwards such proceedings were had in said court that on the 23d day of February, 1884, upon petition duly filed in that behalf, the said pretended will was by an order of said Court in the matter of said estate duly admitted to probate as the last will and testament of said C. W. Carpenter, deceased, and the said Bailey was appointed the executor thereof without bonds as therein

provided, who thereupon took the oath of office and proceeded to act in that capacity, and still acts as such executor.

That the said C. W. Carpenter was a bachelor, and his next of kin and heirs at law were Clinton H. Carpenter, a brother and other brothers of the same family name, who within one year from the time of probate of said pretended will filed in said court in the matter of said estate their verified petition in writing, containing their allegations against the validity of said alleged will, and contesting the validity of the same on the ground of incompetency of said deceased and of fraud, menace, and undue influence on the part of said C. K. Bailey, and praying, among other things, that the probate thereof be revoked and annulled, and that said petitioners be declared the heirs at law of said deceased, and as such entitled to his estate.

That said executor and legatees were made parties defendant in said contest, and they all duly appeared in said action by their respective attorneys, and filed their answers therein denying the material allegations in said petition.

That two several trials were had in said Court and cause before a jury duly impaneled to try the issues raised as aforesaid, and each time the jury rendered a verdict against the validity of the will, and two several decrees were duly made and entered in said court in the matter of said estate in accordance with such verdicts, declaring said pretended will null and void, revoking and annulling the probate thereof, an ddeclaring said petitioners the

heirs at law of said deceased, and as such entitled to his estate.

That an appeal was taken to the Supreme Court of the State of California from each of said decrees, and a new trial was granted in each instance. That the contest over said pretended will is still pending, and has been pending, in said Superior Court since the 21 day of February, 1885, when not on appeal as aforesaid.

II.

That on the 24th day of May, 1884, the said Clinton H. Carpenter and others heirs at law of said C. W. Carpenter, deceased, contestants, in the matter of said pretended will, and the said executor and legatees thereunder, proponents, duly made and entered into an agreement in writing, wherein and whereby the said matters of difference and controversy over said estate should be submitted to F. T. Baldwin, as arbitrator, who should determine in his award the value of said contestant's interest in said estate, and how much they, the said Clinton H. Carpenter and other heirs at law of said C. W. Carpenter, should receive from said estate of Carpenter as their share thereof, and expressly stipulating that such reference should in no way affect the controversy, then pending over said pretended will, but that the same should continue pending in said court, and not be discontinued or dismissed until the award of such arbitrator should be fully performed and carried out.

That said agreement of reference was duly delivered to said Baldwin, who thereupon accepted the appointment as such arbitrator, and afterward duly performed all the duties devolving upon him as such referee, such as were pointed out and included in the aforesaid agreement of reference.

That all the parties to said agreement duly appeared before said arbitrator and presented their case, and filed with him their respective claims upon all the matters to be considered and determined by him as such referee.

That afterwards, on the 4th day of January, 1894, said referee duly made and published his award in writing in the matter of such reference, by delivering to the attorneys of the respective parties thereto a duplicate copy in writing of said award in the premises, which was afterward filed in the office of the clerk of said Superior Court.

That it was decreed and determined in said award, among other things, that said Clinton H. Carpenter and other heirs' interest in said estate of C. W. Carpenter was of the value of $11,256.75-100, which said sum the said Clinton and other heirs at law of said C. W. Carpenter were entitled to receive from his said estate.

That said award has never been carried out or performed, and is, and has been since its rendition, in full force and effect, and binding upon all the parties interested in said estate.

III.

That on the 30th day of October, 1882, the said firm of Bailey and Carpenter gave a mortgage to one Myles P.

O'Connor, as security for the payment of the sum of $10,000, on the following real property situated in the county of San Joaquin, in the State of California, and more particularly described as follows, namely: The east half and northwest quarter of the northeast quarter of section five, in township two, north of range eight, east Mount Diablo base and meridian, and the southeast quarter and the east half of the southwest quarter of section thirty-two, in township three, north of range eight, east of Mount Diablo base and meridian, and known as the Bailey and Carpenter "home place," which said real property was a part of the assets of the firm of Bailey and Carpenter, and part of the assets of the estate of C. W. Carpenter, deceased, to which the said Clinton H. Carpenter and other heirs were entitled as the successors in interest to their late brother.

That subsequent to the death of said C. W. Carpenter, and on the 10th day of October, 1888, an action was brought in said Superior Court of San Joaquin county by the said O'Connor against said C. K. Bailey, Clinton H. Carpenter, as one of the successors in interest of the said C. W. Carpenter, deceased, and others, defendants, to foreclose said mortgage, and on the 15th day of March, 1890, a decree of foreclosure and sale was duly made and entered in said court and cause against said C. K. Bailey and Clinton H. Carpenter and others, defendants, and in favor of said plaintiff, for the sum of $11,808.74, the amount found to be due on said mortgage note and the costs of suit.

That on the 15th day of May, 1894, under an order of said Court previously made in said action of foreclosure, said real property was sold to the said O'Connor at sheriff's sale at Stockton, in said county of San Joaquin, by Thomas Cunningham, who was the duly elected, qualified, and acting sheriff of said county, under and by virtue of an execution duly issued out of said court under said judgment and decree in favor of said O'Connor. That thereupon a sheriff's certificate of sale was duly given by said sheriff to said Myles P. O'Connor, as such purchaser, in which it was stated, among other things, that said real property, sold as aforesaid, was subject to redemption, and the same was subject to redemption by any of said defendants in said action of foreclosure.

IV.

That on the 15th day of September, 1894, Amos H. Carpenter recovered judgment in the Superior Court of said San Joaquin county, against said Clinton H. Carpenter, for the sum of $12,438 damages and costs, and on the same day said judgment was duly docketed by the clerk of said court in his office, so that it became a lien upon the said Clinton H. Carpenter's interest or portion of the real property herein described.

That afterward, on the 17th day of September, 1894, for a good and valuable consideration, said Amos H. Carpenter sold, assigned, and transferred said judgment of $12,438 in his favor, and against said Clinton H. Carpenter,

to your orator, who ever since has been, and now is, the lawful owner and holder thereof.

V.

That after the assignment of said judgment as aforesaid, and on the 18th day of September, 1894, your orator, in the capacity of a judgment creditor of said Clinton H. Carpenter, having a lien on his interest or portion of the real property herein described, handed and tendered to said Thomas Cunningham, as the officer making the sale of said real property, the sum of $12,777.05 in United States gold coin, the same being the full amount of the purchase price of said realty, together with two per cent per month thereon in addition up to that time, and the amount of all taxes and legal assessments paid by said purchaser since the date of sale, for the redemption of said real estate from said mortgage sale, and at the same time handed and produced to said officer a written notice of such redemption, signed by your orator, and stating, among other things, the said capacity in which such redemption was made, a description of the property redeemed, the judgment and execution under which the sale was made, the fact that said Clinton H. Carpenter was a successor in interest to a portion of the said C. W. Carpenter's interest in said property and of the defendants in said action of foreclosure, a description of the said judgment against Clinton H. Carpenter, the docketing of the same by the clerk of said court, and the consequent lien thereof on said realty, the assignment of such judgment to your orator, together with a copy of the docket of the

judgment under which your orator claimed the right to redeem, certified by the clerk of said court, a copy of said assignment from Amos H. Carpenter verified by your orator's affidavit, and his affidavit, showing the amount then actually due on such judgment lien, and thereupon filed a duplicate notice of such redemption in the office of the recorder of said San Joaquin county.

That said officer refused, and ever since has refused, and still continues to refuse, to receive the money for the redemption of said property tendered as aforesaid, and the same was, and ever since has been, and still is, deposited in a bank known as the Stockton Savings and Loan Society at Stockton, California, for the purpose aforesaid, subject to the order of said officer making said sale.

That at the time of such refusal by said sheriff your orator gave him due notice that said gold coin was deposited in said bank for the purpose aforesaid subject to his order, and that such tender would be kept good, and that such amount in gold coin could be drawn by him from said bank at any time upon the giving of the usual certificate of redemption or sheriff's deed for said property.

That after the expiration of six months from the date of said sale, and no judgment debtor having redeemed said property from said mortgage sale, and after the expiration of sixty days from the date of said redemption by your orator, and no other redemptioner having redeemed, your orator demanded of said officer a sheriff's deed of

said real property, such as is usually given in such cases to a redemptioner.

That said sheriff has refused, and still continues to refuse to give a deed thereof to your orator as demanded, and on the 16th day of November, 1894, the said officer made, executed, and delivered to the said Myles P. O'Connor, as purchaser, a sheriff's deed of said property, in which it was stated and recited that no redemption from said mortgage sale had been made, when the said purchaser and the said sheriff well knew such statement to be untrue.

That the said O'Connor has accepted said sheriff's deed notwithstanding such redemption by your orator, and has taken possession of said premises, and refuses to recognize your orator's right to redeem the same as a judgment creditor of Clinton H. Carpenter.

That said real property is of the value of about $34,770.

VI.

That said estate of Carpenter has not been distributed or separated from the partnership assets of Bailey and Carpenter; but is still in the hands of said C. K. Bailey, who still continues to wrongfully carry on said partnership business as though such partnership existed.

That, on information and belief, the said C. K. Bailey has nearly wrecked said estate, and rendered the same nearly insolvent through fraud or mismanagement, and has allowed said property to be sold, for the purpose of defrauding the heirs at law of said Carpenter of their in-

heritance and your orator of the benefit of said judgment lien, and that in pursuance of such purpose, and in collusion with said sheriff, purchaser, and others, he caused said redemption to be prevented and refused, with the intention of securing said property again from the purchaser for himself, or some member of his family, after your orator's and said heirs' right of redemption had expired.

That E. F. Bailey is the son of said C. K. Bailey, and one of the legatees under said pretended will, and that he and the said C. K. Bailey are now farming and carrying on said premises, and dividing the profits thereof with the said purchaser.

That the said E. F. and C. K. Bailey claim some interest in said property, either by lease or otherwise, under said purchaser, the exact nature of which is now unknown to your orator.

VII.

That the annual rents and profits of said real property are of the value of about $1,825, and that the same have been taken and appropriated by the said Baileys or the said O'Connor since the 15th day of May, 1894, no part of which have been received by your orator.

VIII.

That by reason of the aforesaid wrongful and illegal acts of said defendants, your orator is unable to redeem said real property from said mortgage sale, and to enforce

his judgment lien against said Clinton H. Carpenter's portion of said real property, as the successor in interest to his brother's estate, and to get possession and title to said premises as allowed by law, and has thereby been damaged in the sum of $34,770, the value of said real property at the time of said redemption, and in the further sum of $1,825, the value of the rents and profits thereof since the 15th day of May, 1894, up to the time of the commencement of this action, and in the further sum of $2,000 for attorney fees made and incurred herein.

IX.

That on the 21st day of November, 1892, the said Thomas Cunningham, as principal, and R. Gnekow, Andrew Wolf, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, as sureties made, executed, and delivered to the people of the State of California a bond in the sum of $60,000, conditioned that during the next official term commencing on or about the 1st day of January, 1895, the said Thomas Cunningham should well and faithfully perform all the duties devolving by law upon him as sheriff of said county of San Joaquin, to which office he was duly elected at the last general election held in the State of California, on the 8th day of November, 1892, and that in case of his failure so to act, the said sureties should become jointly and severally liable with said principal for all damages sustained by reason of his failure, neglect, or refusal to perform the duties of such sheriff as required by law.

Wherefore, your orator prays that a writ of subpoena issue out of this Honorable Court directed to Myles P. O'Connor, Thomas Cunningham, C. K. Bailey, E. F. Bailey, R. Gnekow, Andrew Wolf, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis and Moses Marks, to appear and answer the foregoing petition as required by law; that a decree may be made and entered against said defendants; that said sheriff's deed made, executed, and delivered to the said O'Connor by said officer on the 16th day of November, 1894, be delivered up to be canceled, and the same be declared null and void; that your orator be allowed to redeem said premises in the character of a judgment creditor of Clinton H. Carpenter; that said Thomas Cunningham, as the officer making the sale of said property, make, execute, and deliver to your orator a sheriff's deed of said premises, such as is usually made in case of a redemption of real property from a mortgage sale by a redemptioner; that said C. K. Bailey and E. F. Bailey have no right, title, or interest in and to said premises, and that they are trespassers thereon; that defendants be removed from the possession of said premises, and that your orator be placed in possession thereof; and for the sum of $1,825, the value of the rents and profits of said real property from the 15th day of May, 1894, up to the time of the commencement of this action, and for the sum of $2,000, as attorney fees incurred herein and the costs of this proceeding; that in case title and possession of said real property cannot be had, for the sum of $34,770, the value of said premises, in lieu of such re-

demption, and for such other and further relief as to the Court may seem just and equitable.

L. W. ELLIOTT,
Solicitor for Plaintiff.

State of California, }
County of } ss.

Bernard McGorray, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing bill, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated on his information and belief, and to those matters, that he believes it to be true.

BERNARD McGORRAY.

Subscribed and sworn to before me this 6th day of December, 1894.

W. J. COSTIGAN,
Commissioner and Clerk U. S. Circuit Court, Northern District of California.

[Endorsed]: Filed December 6th, 1894. W. J. Costigan, Clerk.

Subpoena ad Respondendum.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

The President of the United States of America, Greeting, to Myles P. O'Connor, Thomas Cunningham, C. K. Bailey, E. F. Bailey, R. Gnekow, Andrew Wolf, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks:

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in San Francisco, on the fourth day of February, A. D. 1895, to answer a bill of complaint exhibited against you in said court by Bernard McGorray, who is a citizen of the State of Illinois, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 3d day of Janu-

ary, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the 119th.

[Seal] W. J. COSTIGAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court U. S.—You are hereby required to enter your appearance in the above suit, on or before the first Monday of February next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

W. J. COSTIGAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Endorsed]:

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 9th day of January, 1895, on Myles P. O'Connor, by delivering to, and leaving with, Patrick Dougherty, an adult person, who is a resident in the family of Myles P. O'Connor said defendant named therein, at the county of Santa Clara, in said district, an attested copy thereof, at

the dwelling-house of Myles P. O'Connor, one of said defendants herein.

San Francisco, January 25th, 1895.

BARRY BALDWIN,
U. S. Marshal.
By P. H. Maloney,
Deputy.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 11th day of ——— 189 , on Thomas Cunningham and I. S. Bostwick, by delivering to, and leaving with, Thomas Cunningham and I. S. Bostwick, said defendants named therein, at the county of San Joaquin, in said district, an attested copy thereof.

San Francisco, January 25th, 1895.

BARRY BALDWIN,
U. S. Marshal.
By P. H. Maloney,
Deputy.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 12th day of January, 1895, on John Jackson, R.

Gnekow, Andrew Wolf, T. W. Newell, Wm. Inglis, by delivering to, and leaving with John Jackson, R. Gnekow, Andrew Wolf, T. W. Newell, Wm. Inglis, said defendants named therein, at the county of San Joaquin, in said district, an attested copy thereof.

San Francisco, January 25th, 1895.

BARRY BALDWIN,
U. S. Marshal.
By P. H. Maloney,
Deputy.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 12th day of January, 1895, on Moses Marks, by delivering to, and leaving with, M. P. Stein, an adult person, who is a member or resident in the family of Moses Marks, said defendant named therein, at the county of San Joaquin, in said district, an attested copy thereof, one of said defendants herein.

San Francisco, January 25th, 1895.

BARRY BALDWIN,
U. S. Marshal.
By P. H. Maloney,
Deputy.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 14th day of January, 1895, on E. F. Bailey, by delivering to, and with, C. K. Bailey, his father, said defendant named therein, personally, at the county of San Joaquin, in said district, a certified copy thereof.

San Francisco, January 25th, 1895.

BARRY BALDWIN,
U. S. Marshal.
By P. H. Maloney,
Deputy.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 14th day of January, 1895, on C. K. Bailey, by delivering to, and leaving with, C. K. Bailey, said defendant named therein, personally, at the county of San Joaquin, in said district, a certified copy thereof.

San Francisco, January 25th, 1895.

BARRY BALDWIN,
U. S. Marshal.
By P. H. Maloney,
Deputy.

Filed January 25. 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 8th day of January, 1895, and personally served the same on the 9th day of January, 1895, by delivering to, and leaving with, Patrick Dougherty, an adult person, an attested copy thereof, at the dwelling-house of Miles P. O'Connor, one of the defendants herein, at the county of Santa Clara, in said district, and Patrick Dougherty stated to me, when I told him I wanted to make a legal service, and it was necessary for me to know if he was a resident of the family, at the same time reading the blank return on the back of said writ to him, that Miles P. O'Connor and his family were at that time in France. At the time of said service Patrick Dougherty came out of the said dwelling-house of Miles P. O'Connor, and I delivered to and left said attested copy of said writ with him, the said Patrick Dougherty, just outside of the kitchen door of said dwelling; and said Patrick Dougherty, in response to my questions, said he resided there then at the times above stated, and was taking care of the place, and that he was employed there and lived there on the premises before Miles P. O'Connor and his family went to France.

Dated San Francisco, this 7th day of May, 1895.

BARRY BALDWIN,
United States Marshal.
By P. H. Maloney,
Deputy.

Circuit Court of the United States, Ninth Judicial Circuit
Northern District of California.

BERNARD McGORRAY,
Plaintiff,

vs.

MILES P. O'CONNOR, THOMAS CUNNINGHAM, C. K. BAILEY, E. F. BAILEY, ANDREW WOLF, R. GNEKOW, JOHN JACKSON, T. W. NEWELL, I. S. BOSTWICK, WILLIAM INGLIS, and MOSES MARKS,
Defendants.

Demurrer of Thomas Cunningham et al.

The demurrer of the above-named defendants, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, William Inglis, and Moses Marks, to the bill of complaint of the above named plaintiff.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, jointly demur to the said bill, and for causes of demurrer showeth:

I.

That enough does not appear upon the face of the bill to show the Court's jurisdiction of the suit, in consequence of the want of proper and necessary averment of citizenship of the parties.

II.

That it appeareth by the plaintiff's own showing by the said bill that he is not entitled to the relief prayed by the bill against these defendants or any of them.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, these defendants do demur thereto. And they pray the judgment of this Court whether they, or any of them, shall be compelled to make any answer to the said bill; and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

DUDLEY & BUCK,

Solicitors and of Counsel for Defendants, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Adrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, William Inglis, and Moses Marks.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

Feby. 28, 1895. GEORGE F. BUCK,

Of Counsel for the Defendants Who have Demurred.

State of California,
County of San Joaquin. } ss.

Thomas Cunningham, being duly sworn, deposes and says: I am one of the above-named defendants; the foregoing demurrer is not interposed for delay.

THOS. CUNNINGHAM.

Subscribed and sworn to before me this 28th day of Feb., 1895.

[Seal] C. W. WILBER,

Notary Public in and for the County and State aforesaid.

Rec'd copy March 2d, 1895, within demurrer.

L. W. ELLIOTT,
Sol. for Plaintiff.

[Endorsed]: Filed March 4th, 1895. W. J. Costigan, Clerk.

Alias Subpoena ad Respondendum.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

The President of the United States of America, Greeting, to Myles P. O'Connor.

You are hereby, as you have heretofore been commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in San Francisco, on the second day of December, A. D. 1895, to answer a bill of complaint exhibited against you in said court by Bernard McGorray, who is a citizen of the State of Illinois, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 5th day of November, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the 120th.

[Seal] W. J. COSTIGAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.—You are hereby required to enter your appearance in the above suit, on or before the first Monday of December next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

W. J. COSTIGAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Endorsed]:

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 5th day of November, 1895, and personally served the same on the 5th day of November, 1895, on Myles P. O'Connor, by delivering to and leaving with Myles P. O'Connor, said defendant named therein, at the city and county of San Francisco, in said district, an attested copy thereof.

San Francisco, November 5th, 1895.

BARRY BALDWIN,
U. S. Marshal.

By J. D. Harris,
Deputy.

Filed Nov. 6th, 1895 W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, for the Northern District of California.

BERNARD McGORRAY,
Plaintiff,
vs.
MYLES P. O'CONNOR et al.,
Defendants.

Demurrer of Myles P. O'Connor to Bill of Complaint.

This defendant by protestation, not confessing or acknowledging all or any of the matters in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows that the said complainant hath not in said bill made or stated such a cause as does or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

Wherefore, this defendant demands the judgment of this Honorable Court whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed, with his reasonable costs in this behalf sustained.

OLNEY & OLNEY,
Solicitors for Defendant O'Connor.
WARREN OLNEY, of counsel.

Certificate of Counsel.

I, Warren Olney, do hereby certify that I am counsel for the defendant O'Connor in the above-entitled action, and that, in my opinion, the foregoing demurrer is well founded in point of law, and that said demurrer is not interposed for delay.

Dated San Francisco, December 2d, 1895.

WARREN OLNEY.

[Endorsed]: Filed Dec. 2d, 1895. W. J. Costigan, Clerk.

At a stated term, to-wit, the February term, A. D. 1896, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 2d day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Present, The Honorable JOSEPH McKENNA, Circuit Judge.

BERNARD McGORRAY,
vs.
MYLES P. O'CONNOR et al., } No. 12022.

Order Overruling Demurrers.

The demurrers to the bill herein heretofore submitted having been fully considered, it was ordered that said demurrers be, and they hereby are, overruled, with leave to defendants to plead to the jurisdiction, or answer within twenty days.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD McGORRAY, Plaintiff,
vs.
MYLES P. O'CONNOR et al., Defendants.

Answer of Defendant Myles P. O'Connor.

Now comes the defendant, Myles P. O'Connor, in the above-entitled action, and for answer to the bill of com-

plaint filed herein admits, alleges, and denies as follows:

He alleges upon his information and belief, that Bernard McGorray, the complainant herein, was, at the date of filing the bill of complaint herein, and for a long time prior thereto, a citizen of the State of California, and was not a citizen of the State of Illinois, as in said bill of complaint alleged.

He admits that for many years previous to the 22d day of January, 1884, C. K. Bailey and C. W. Carpenter were general partners in farming and stock-raising in the county of San Joaquin, State of California, under the firm name of "Bailey & Carpenter."

He admits that on the 22d day of January, 1884, said C. W. Carpenter died in said county of San Joaquin and left an estate therein, which consisted largely of his undivided one-half interest in said partnership property of Bailey & Carpenter.

He admits and alleges that afterwards said C. K. Bailey filed in the office of the clerk of the Superior Court of said county of San Joaquin a paper purporting to be the last will and testament of said C. W. Carpenter, deceased, in which the bulk of his property was given to the children of said C. K. Bailey to the exclusion of his heirs at law.

He admits that said C. K. Bailey was named therein as the executor of said will without bonds.

He admits and alleges that afterwards such proceedings were had in said court on the 23d day of February, 1884, upon petition duly filed in that behalf, the said will of C. W. Carpenter was, by an order and judgment of said

Court duly entered and made in the matter of said estate, duly admitted to probate as the last will and testament of said C. W. Carpenter, deceased, and the said C. K. Bailey was appointed the executor thereof without bonds, as therein provided, who thereupon took the oath of office, and proceeded to act in that capacity, and still acts as such executor.

He admits that the said C. W. Carpenter was a bachelor, and that his next of kin and heirs at law were Clinton H. Carpenter, a brother, and other brothers of said deceased, and the children of other brothers and sisters of said deceased, who, within one year from the time of the probate of said will of C. W. Carpenter, filed in said court in the matter of said estate their petition in writing, containing their allegations against the validity of said will, and contesting the validity of the said will, on the ground of incompetency of said deceased, and of fraud, menace, and undue influence on the part of said C. K. Bailey, and praying, among other things, that the probate thereof be revoked and annulled, and that said petitioners be declared the heirs at law of said deceased, and as such entitled to his estate.

He admits that said executor and legatees were made parties defendant in said contest, and they all duly appeared in said action, by their respective attorneys, and filed their answer therein denying the material allegations in said petition.

He admits that two trials were had in said court upon the issues raised as aforesaid in the matter of the contest

of said will, and each time the jury rendered a verdict against the validity of the will, and that decrees were duly made and entered in said court in the matter of said estate in accordance with such verdicts, and that upon appeal to the Supreme Court of the State of California, each of said decrees were reversed, and a new trial granted in each instance, and that the contest over said pretended will is still pending in said Superior Court.

He alleges, upon his information and belief, that the contract or agreement for submitting the differences in controversy between the proponents of said will and the heirs of said C. W. Carpenter is in the words and figures following to-wit:

In the Superior Court of the County of San Joaquin, State of California

In the Matter of the Estate of C. W. CARPENTER, Deceased.
ABEL F. CARPENTER et al, Contestants,

vs.

C. K. BAILEY, et al., Proponents.

Whereas a contest of the will of C. W. Carpenter is now pending and undetermined between the above-named contestants and proponents, and all parties interested in the said contest agree that the same be settled, compro-

mised, and terminated, and further litigation thereunder prevented.

And whereas the parties thereto are unable to agree upon the terms of settlement and compromise, and are willing to submit the question to Frank T. Baldwin for determination:

Now, therefore, in consideration of the premises, and in consideration of and for the purpose of avoiding and preventing further litigation in the matter of the said estate, and settling and terminating the said contest, and in consideration of the mutual promise hereby made, it is hereby agreed, by and between the said contestants and proponents, that the said matter shall be referred to Frank T. Baldwin, as referee, to fix and determine what under all the circumstances of the case is a reasonable, just, and equitable amount or portion of the said estate to be set over to such contestants in full of all claims of each and every of them.

"He, the said referee, shall ascertain and determine the present net value of the said estate, and for such purpose may take such steps as he may deem necessary. He shall fix and determine the value of the land of the said estate per acre, and also the amount of money which the contestants are entitled justly and equitably to receive, and shall thereupon deliver his written statement thereof to the attorneys of the respective parties to such contest.

The proponents shall have five days from and after the receipt of such statement within which to decide whether they will pay contestants in land or money. If they elect

to pay in land, there shall be made and delivered to the said contestants' attorney in fact, A. H. Carpenter, within thirty days from the time of the exercise of such election, deeds of so much of the said land as at the valuation fixed and determined by the said referee per acre shall make the amount found by the referee as the sum to be paid to such contestants, which said land shall be in one parcel, and may be designated by the said referee, provided, however, that the land deed shall not include any part of the west half of section 32, in township 3 north, range 9 east, M. D. M., nor any part of the 'home place,' so called.

The said contestants and proponents hereby agree to be bound by the findings of the said referee, and the said findings shall be binding upon each and every of them, and said parties may, and they are hereby given the right to, take any and all proper and legal steps and measures to enforce the full and perfect performance thereof, either to obtain the dismissal of said contest on the one part, or the specific performance of this agreement upon the other.

The said referee shall be allowed for his services the sum of $250, and such sum in addition thereto as may be required to pay such expenses as may be incurred by him in and about the reference, which sums shall be paid out of the said estate.

None of the parties hereto shall have the right to offer any evidence before the said referee, but such referee, for the purpose of aiding him in determining the true condition and value of the said estate, may call for statements from either party hereto, and take such evidence

as to him shall seem necessary to a proper determination of the question hereby submitted to him.

"In determining the amount to be allowed to the contestants, and in considering the claims against the said estate, the referee shall also take into consideration the fact that a certain claim of C. K. Bailey, filed and approved in said estate for a note made by deceased in his lifetime, is contested for the same reasons and on the same grounds as made to the will.

"In witness whereof, the said contestants and proponents have hereunto affixed their hands and seals this day of May, 1893.

It is further stipulated and agreed that if either or any of said parties refuse to conform to or abide by the decision of said referee, or carry out the provisions thereof, a decree may and shall be entered in the matter of the contested will herein against the parties so refusing to abide by or carry out the decision of the said referee, and that said decree shall be entered against the party or parties so refusing the same as though said contest had been tried by a jury and a verdict rendered against said party or parties so refusing to abide by or carry out said award.

Dated May , 1893.

L. M. WALKER,
E. D. MIDDLEKAUFF,
ADDIE MIDDLEKAUFF,
NETTIE O. WALKER,
HATTIE M. BAILEY,
EDDIE F. BAILEY,
C. K. BAILEY.

A. H. CARPENTER,
Attorney in Fact for Contestants.

This agreement is signed by the said A. H. Carpenter, upon the condition that the original contract shall be carried out, namely: That only the legal claims against said estate shall be considered and the determination of the referee as to such legality shall be final and conclusive; that said referee shall designate the land to be received by the contestants; and that said Carpenter shall receive two span of good driving horses to be taken at appraised value as a part of such award.

May 24th, 1893. A. H. CARPENTER.

Those horses that C. K. Bailey is in the habit of driving shall not be chosen by the said Carpenter.

Exhibit on motion this 8th Oct., 1894.

ANSEL SMITH, Judge.

[Endorsed]: Filed October 8th, 1894. C. W. Yolland, Clerk. By T. H. Heffernan, Deputy Clerk.

He alleges, upon information and belief, that the only agreement between the said proponents and the said contestants of said will in relation to arbitration is the one above set out, and is the agreement referred to in paragraph 11 of the bill of complaint.

He alleges that any statement contained in the bill of complaint of the terms of said agreement, other and different from those set out in the agreement hereinabove copied in full, is false and untrue.

He admits and alleges that said agreement of reference was duly delivered to said Baldwin, who thereupon accepted the appointment as such arbitrator, and after-

ward duly performed all the duties devolving upon him as such referee as were pointed out and included in the aforesaid agreement of reference.

He admits that all the parties to said agreement duly appeared before said arbitrator and presented their case, and filed with him their respective claims upon all the matters to be considered and determined by him as such referee.

He admits that afterwards, on the 4th day of January, 1894, said referee duly made and published his award in writing in the matter of said reference, by delivering to the attorneys of the respective parties thereto a duplicate of said award in the premises, which was afterward filed in the office of the clerk of said Superior Court.

He alleges that the award in writing of said Baldwin, referee as aforesaid, is in the words and figures following to-wit

In the Superior Court of the County of San Joaquin, State of California.

ABEL F. CARPENTER et al.,
Contestants.

vs.

C. K. BAILEY, et al.,
Proponents.

To the Honorable, the Superior Court of the County of San Joaquin, State of California, and to proponents and contestants herein:

"A reference having been heretofore made to me by agreement of said proponents and contestants, dated May 24, 1893, authorizing and empowering me to fix and determine a compromise and settlement of the above-entitled matter, and requiring me to report the same to proponents and contestants herein, I herewith respectfully submit the following as my report as such referee:

"That I have taken testimony herein, and fully considered the same, and also the statements of proponents and contestants submitted to me, and have examined the records of the Court pertaining to the said matter, and hereby fix the annexed statement to be a true and correct statement of all matters submitted to me for reference and decision.

Total value of the estate of C. W. Carpenter, deceased, ... $31,513.50

Total indebtedness of said estate 9,000.00

Net value of the estate of C. W. Carpenter, deceased. 22,513.50

"Value of the interest of children of C. K. Bailey in the estate of C. W. Carpenter, deceased, I find to be $11,256.75.

"Value of the interest of the contestants herein in the estate of C. W. Carpenter, deceased, I find to be in money, $11,256.75.

"In case contestants elect to take land instead of said sums of money, I hereby select and designate the following pieces or parcels of land belonging to said partnership, as and for contestants' share of said estate in lieu of said sum of $11,256.75, the money value thereof.

"1st. That certain piece or parcel of land situate, lying and being in the county of San Joaquin, State of California, and particularly described as follows, to-wit:

"The east 561 acres of section 25, township 3 north, range 8 east, Mt. Diablo base and meridian, and valued by me at $16.00 per acre, or a total value of $8,976.00.

"2d. That certain piece or parcel of land situate, lying and being in the county of San Joaquin, State of California, and particularly described as follows, to-wit:

"The southwest quarter of section 30, township 3 north, range 9 east, Mt. Diablo base and meridian, consisting of 228 acres, and valued by me at $10.00 per acre, or the total value of $2,280.00.

Total value of lands thus described and designated, $11,256.00.

Most respectfully submitted
F. T. BALDWIN,
Referee.

Dated January 4th, 1894.

[Endorsed]: 1271. Carpenter v. Bailey. Filed October 8th, 1894. C. W. Yoland, Clerk. By T. H. Heffernan, Deputy Clerk."

He admits and alleges that the foregoing award is the award in writing referred to in paragraph 11 of the complaint.

He admits and alleges that said award is, and has been since its rendition, in full force and effect, and binding upon all the parties to said agreement of reference; but he denies that it is binding upon this defendant.

He admits and alleges that on the 30th day of October, 1882, the said firm of Bailey & Carpenter gave a mortgage to this defendant, as security for the payment of the sum of $10,000 upon the real property situated in the county of San Joaquin, State of California, and more particularly described as follows, viz:

The east half of the northeast quarter of the northeast quarter of section 5, in township 2 north, range 8 east, Mt. Diablo base and meridian; and the southeast quarter and the east half of the southwest quarter of section 32, in township 3 north, range 8 east, Mt. Diablo base and meridian, and known as the "Bailey & Carpenter Home

Place." He admits and alleges that said real property at all times was a part of the assets of the firm of "Bailey & Carpenter."

But he denies that said real property constituted any part of the assets of the estate of C. W. Carpenter, or that Clinton H. Carpenter, or any other heirs of the said deceased, were or are entitled to any interest therein as the successors in interest of their late brother, the said C. W. Carpenter, deceased.

He admits and alleges that subsequent to the death of said C. W. Carpenter, and on the 10th day of October, 1888, an action was brought in said Superior Court of San Joaquin county by this defendant against the said C. K. Bailey individually, C. K. Bailey as executor of the will of C. W. Carpenter, deceased, and C. K. Bailey as the surviving partner of the firm of Bailey & Carpenter, to foreclose said mortgage Said action was brought under and in compliance with the provisions of chapter I, title 10, part II, of the Code of Civil Procedure of the State of California.

He admits that he made certain heirs and legatees of C. W. Carpenter, deceased, parties defendant in said foreclosure suit; but in that behalf he alleges that said heirs and legatees were not necessary or proper parties defendant, and that the only purpose of making said heirs and legatees defendants was a precautionary one, and in order to cut off any possible right of redemption they might have from the said mortgage.

He alleges that on the 15th day of March, 1890, the Superior Court of the county of San Joaquin, State of

California, gave, made, and entered a judgment in compliance with said provisions of said Code of Civil Procedure, foreclosing the said mortgage, and directing the real property in said mortgage described to be sold for the purpose of satisfying the judgment.

He alleges that said judgment of foreclosure was in favor of this defendant, plaintiff therein, as against the said C. K. Bailey as an individual, and as against the said C. K. Bailey as executor of the will of C. W. Carpenter, deceased, and as against C. K. Bailey as surviving partner of the firm of Bailey & Carpenter. He denies that said judgment was against the said Clinton H. Carpenter for any sum of money whatever, or that any judgment against the said Clinton H. Carpenter was entered in said cause other than to cut off any supposed right of redemption in said real property in the complaint and in the mortgage described.

He alleges that no personal judgment was taken in said action against any defendant whatsoever, except as against the defendant C. K. Bailey.

He admits and alleges that on the 15th day of May, 1894, under an order of said Superior Court of San Joaquin county previously made in said action of foreclosure, said real property was sold to said O'Connor at sheriff's sale at Stockton, in said county of San Joaquin, by Thomas Cunningham, who was the duly elected, qualified, and acting sheriff of said county, under and by virtue of an execution duly issued out of said court upon said judgment and decree in favor of this defendant, and that thereupon a sheriff's certificate of sale was duly given by

said sheriff to said Myles P. O'Connor as such purchaser, in which it was stated, among other things, that said real property sold as aforesaid was subject to redemption in gold coin of the United States pursuant to the statute in such case made and provided.

He denies that said certificate of sale stated that said property was subject to redemption by any of said defendants in said action of foreclosure, or that there was any other or different statement respecting redemption than that the land "is subject to redemption in gold coin of the United States pursuant to the statute in such cases made and provided."

He denies that any judgment recovered by Amos H. Carpenter against the said Clinton H. Carpenter whatever ever became a lien upon the said Clinton H. Carpenter's interest or portion of the real property described in the bill of complaint herein, or described in the mortgage from Bailey & Carpenter to this defendant.

He alleges that he has not sufficient information or belief to enable him to answer the allegation that on the 17th day of September, 1894, for a good and valuable consideration, said Amos H. Carpenter sold, assigned, and transferred said judgment of $12,438 in his favor and against said Clinton H. Carpenter, to your orator, who ever since has been, and now is, the lawful owner and holder thereof; and for that reason he denies that on the 17th day of September, 1894, or at any other time, for a good and valuable consideration, said Amos H. Carpenter sold or assigned or transferred said judgment of $12,438 in his favor, against said Clinton H. Carpenter, to the

complainant herein, or that he assigned or transferred said judgment to the complainant herein, or that the complainant ever since has been, or is now, the lawful owner or holder thereof.

He alleges that any attempted redemption from said judgment made by the complainant herein was as a volunteer, and not in the capacity of a judgment creditor of said Clinton H. Carpenter, and that the said complainant never at any time had a lien or interest upon, in, or to any portion of the real property in the bill of complaint described, and described in the mortgage from Bailey & Carpenter to this defendant.

He alleges that no redemption or offer to redeem from the said sheriff's sale of said property under said judgment of decree and decree of foreclosure and sale has ever been made by anyone who had any interest in, or lien upon, the property described in the bill of complaint.

He denies that said real property is of the value of $34,770, or any greater value than $15,000.

He admits and alleges that the said estate of C. W. Carpenter, deceased, has not been distributed or separated from the partnership assets of Bailey & Carpenter, but is still in the hands of the said C. K. Bailey.

He denies, on his information and belief, that the said C. K. Bailey has nearly or at all wrecked said estate, or rendered the same nearly or at all insolvent through fraud, or mismanagement,or at all, or allowed said property to be sold for the purpose of defrauding the heirs at law of said Carpenter of their inheritance, or for any other purpose whatever, or at all, or for the purpose of

depriving the complainant herein of the benefit of said judgment or lien, or at all, or for any other purpose whatsoever, or that in pursuance of such purpose, or in collusion with said sheriff, purchaser, or others, he caused said redemption to be prevented or refused, with the intent of securing said property again from the purchaser for himself or some member of his family after complainants' or said heirs' right of redemption had expired. And in that behalf this defendant alleges that no agreement of any kind whatsoever has been made between this defendant and the said C. K. Bailey respecting the title to said land, or tending to or intended to deprive the complainant of his interest therein.

He admits that since the execution of the said sheriff's deed he has entered into the possession of the real property therein described, and has leased the same to the said E. F. Bailey in his own right.

He denies, upon his information and belief, that the said C. K. Bailey, as an individual, or as the executor of the will of C. W. Carpenter, deceased, or as the surviving partner of Bailey & Carpenter, or in any other way, claims any interest in said property, either by lease or otherwise, under this defendant or at all.

He denies that the annual rents or profits of said real property are of the value of about $1,825, or of any greater value than the sum of $1,000.00; and he denies that any sum above $666.70 has been taken or appropriated by this defendant or the said Bailey, or either of them, since the 15th day of May, 1894.

He denies that by reason of any wrongful or illegal act of the defendants the complainant is unable to redeem said real property from said mortgage sale, or to enforce any lien which he may have against said Clinton H. Carpenter's portion of said real property, if he has any portion, as the successor in interest to his brother's estate, or to get title or possession of said premises, or that he has been damaged in the sum of $34,770, or any other sum, the value of said real property at the time of said redemption, or in the further sum of $1,825, or any other sum of money, the value of the rents and profits thereof since the 15th day of May, 1894, up to the time of the commencement of this action, or in the further sum of two thousand dollars ($2,000), or any other sum, for attorney's fees incurred herein.

Wherefore, having fully answered, he asks to be hence dismissed with his costs.

WARREN OLNEY,
Solicitor for Defendant O'Connor.

State of California,
City and County of San Francisco } ss.

Robert Watt, being first duly sworn, deposes and says that he is the agent and attorney in fact of Myles P. O'Connor, one of the defendants herein; that the said Myles P. O'Connor is absent from the city and county of San Francisco, and does not reside therein; that deponent has at all times had charge of the business of the

said O'Connor, in so far as the same relates to the matters and things set out in the bill of complaint and in the answer herein, and the said O'Connor knows nothing thereof, except as he has been informed by this deponent; that this deponent has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ROBT. WATT.

Subscribed and sworn to before me this 24 day of March, 1896.

[Seal] JAMES L. KING,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Due service of the within answer at Stockton this 26 day of March, A. D. 1896, is hereby admitted.

A. H. CARPENTER & L. W. ELLIOTT,

Solicitors for Complainant.

[Endorsed]: Filed March 27th, 1896. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD McGORRAY,
Plaintiff,

vs.

MYLES P. O'CONNOR, THOMAS CUNNINGHAM, C. K. BAILEY, E. F. BAILEY, ANDREW WOLF, R. GNEKOW, JOHN JACKSON, T. W. NEWELL, I. S. BOSTWICK, Wm. INGLIS, and MOSES MARKS,
Defendants.

Answer of Thomas Cunningham et al.

Now comes the defendants in the above-entitled action, towit, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, and for answer to the bill of complaint filed herein admit and deny as follows:

First.

Deny upon and according to their information and belief that the said complainant, Bernard McGorray is or at

the time of the filing of his bill of complaint herein was, a citizen of Chicago or a citizen of the State of Illinois. But, on the contrary, said defendants aver, charge, and show upon and according to their information and belief that he then was, and ever since has been, a citizen of the State of California.

Second.

Said defendants admit that on the 22d of February, 1884, C. K. Bailey and C. W. Carpenter were general partners in farming and stock raising in the county of San Joaquin, State of California, doing business under the firm name and style of "Bailey & Carpenter."

Third.

Admit that on said 22d day of February, 1884, said Carpenter died, leaving an estate in said county aforesaid, which consisted largely of his individual one-half interest in said partnership property of Bailey & Carpenter.

Fourth.

Admit that at the time charged in said bill of complaint C. K. Bailey filed in the office of the clerk of the Superior Court of said county of San Joaquin a paper purporting to be, and which defendants aver was, the last will and testament of said C. W. Carpenter, deceased; and admit that in and by said last will and testament the bulk of his property was given to the children of said C. K.

Bailey, to the exclusion of his heirs at law, and that said C. K. Bailey was named as executor of said will.

Fifth.

Admit that said alleged pretended will was, by an order of said Superior Court in the matter of said estate, made on the 23d day of February, 1884, duly admitted to probate as the last will and testament of said C. W. Carpenter, deceased, and that said C. K. Bailey was appointed the executor thereof, without bonds as therein provided, and thereupon took the oath of office, and proceeded to act in that capacity, and is still acting as such executor.

Sixth.

Admit that C. W. Carpenter was a bachelor, and that his next of kin and heirs at law were Clinton H. Carpenter, a brother, and other brothers of the same family name within one year from the time of the probate of said will filed in said court, in the matter of said estate, their verified petition in writing, containing their allegations against the validity of said will, and contested the validity of the same on the ground of incompetency of said deceased, and of fraud, menace, and undue influence on the part of said C. K. Bailey, and praying that the probate thereof be revoked and annulled, and that the petitioners be declared the heirs at law of said deceased, and as such entitled to his estate.

Seventh.

Admit that said executor and legatees were made parties defendant in said contest, and appeared in said action by their respective attorneys, and filed answers there in as charged in said bill of complaint.

Admit that two several trials were had in said court and cause before a jury, and that at each trial the jury rendered a verdict against the validity of the will, and that two several decrees were duly made and entered in said court in the matter of said estate, in accordance with such verdicts, declaring said will null and void, and revoking and annulling the probate thereof, and declaring said petitioners the heirs at law of said deceased, and as such entitled to his estate.

Eighth.

Admit and charge and aver that an appeal was taken to the Supreme Court of the State of California from each of said decrees so made and entered as aforesaid, and that said decrees, and each of them were reversed and set aside, and a new trial granted in each instance. And admit and charge that the contest over said will is still pending and undetermined, and has been so pending in said Superior Court since the 21st day of February, 1885, when not on appeal in the Supreme Court as aforesaid.

Ninth.

Said defendants admit that on the day of May, 1893, an agreement was made and entered into by and between the parties hereinafter named to compromise, settle, and determine the matters in contest over the will of the said C. W. Carpenter, and to that end submit the terms of settlement to Frank T. Baldwin. That the parties and persons to said contract, and who signed the same, are L. M. Walker, E. D. Middlekauf, Addie M. Middlekauf, Nettie O. Walker, Hattie M. Bailey, Eddie F. Bailey, C. K. Bailey, and A. H. Carpenter, "attorney in fact for contestants," and none others. That no other contract of settlement, compromise, or arbitration was ever made, and is the contract referred to in paragraph II. of said bill of complaint, and the same is hereby attached to and made a part of this answer, and marked Exhibit "A."

Deny upon and according to their information and belief that all the parties to said agreement appeared before said arbitrator, or presented their case or filed with him their respective claims upon all or any of the matters to be considered or determined by him as such referee.

And, upon like information and belief, said defendants aver, charge, and show, that some of the persons who signed said agreement of arbitration were minors, and, by reason thereof, incompetent to enter into any contract or arbitration of and concerning the matters and things set out in said agreement.

And said defendants further deny that any of the legatees of the will of said C. W. Carpenter duly, or at all, made and entered into any agreement in writing, or otherwise, wherein or whereby the said matters of difference and controversy over said estate or any matter whatever, should be submitted to F. T. Baldwin, as arbitrator, or at all, to determine by an award the value of contestants' interest in said estate, or how much the said Clinton H. Carpenter and other heirs at law of said C. W. Carpenter, or either or any of them, should receive from said estate of Carpenter as their share thereof, or expressly, or at all, stipulated that such reference should in no way affect the controversy then pending over said will, or that the same should continue pending in said court, and not be discontinued or dismissed until the award of such arbitration should be fully performed and carried out.

Deny that said award is in full force or effect, or binding on all or any of the parties interested in said estate.

Admit that on the 30th day of October, 1882, the said firm of Bailey & Carpenter gave a mortgage to Myles P. O'Connor, who is one of the defendants named in this action, as security for the payment of the sum of $10,000.-06 on the real property described in paragraph III of the bill of complaint herein; and admit that said real property so mortgaged as aforesaid, at the time of the execution of said mortgage, was a part of the assets of the firm of Bailey & Carpenter, and a part of the assets of the estate of C. W. Carpenter, deceased; but deny that the said Clinton H. Carpenter, or other heirs, of C. W. Carpenter,

or any of them, are the successors in interest to said real estate of said C. W. Carpenter, or that they, or any of them, are entitled to any part of said real estate as the alleged successor or successors in interest of their late brother, C. W. Carpenter.

Admit that on the 10th day of October, 1888, an action was brought in said Superior Court of the county of San Joaquin by the said O'Connor against C. K. Bailey, Clinton H. Carpenter, and other defendants to foreclose said mortgage; but deny that said action was brought against said Clinton H. Carpenter and the other defendants as one of the successors in interest of the said C. W. Carpenter, deceased. Admit that on the 15th day of March, 1890, a decree of foreclosure and sale was duly made and entered in said court and cause against the defendants herein and in favor of said Myles P. O'Connor, for the amount specified in said bill of complaint herein, to-wit, the sum of $11,808.74-100, which was the amount found due on said note and mortgage, and costs of suit.

They admit that on the 15th day of May, 1894, under an order of said Superior Court previously made in said action of foreclosure, said real property was sold to the said O'Connor at sheriff's sale by Thomas Cunningham, defendant herein, and sheriff of the county of San Joaquin, under and by virtue of an execution issued out of said court under said judgment and decree in favor of said O'Connor, and that a sheriff's certificate of sale was delivered by said sheriff to said Myles P. O'Connor as such purchaser; but deny that said certificate of sale stated or declared that said real property so sold was sub-

ject to redemption by any of said defendants in said action of foreclosure. But as matter of fact they charge and aver, upon their information and belief and advice of counsel, that the said Clinton H. Carpenter, at the time of such sale under said decree of foreclosure, had no right of redemption, nor has he since had, from such sale.

Admit that at the time charged in the bill of complaint, to-wit, September 15th, 1894, Amos H. Carpenter obtained judgment in the Superior Court of said San Joaquin county against said Clinton H. Carpenter for the sum of $12,428.00 damages and costs; but deny, upon their information and belief, that on said day, or at any time, said judgment became, or ever was, a lien upon the land, or any part or portion thereof, mentioned and described in paragraph III of said bill of complaint, or ever was a lien upon the alleged interest or portion of the said Clinton H. Carpenter in and to said real property.

That said defendants admit that after the assignment of said judgment, to-wit, on the 18th day of September, 1894, "your orator," in the alleged capacity of a judgment creditor of said Clinton H. Carpenter, claiming to have a lien on said Clinton H. Carpenter's alleged interest or portion of the real property hereinbefore described, tendered to said defendant, Thomas Cunningham, the person and officer as sheriff making the sale of said real property, the sum of $12,777.05-100 in United States gold coin, the same being the full amount of the purchase price of said realty, together with two per cent per month thereon in addition up to that time, and the amount of all taxes and assessments paid by said purchaser since the

date of said sale for the redemption of said real estate from said mortgage sale; and also handed and produced to said officer a written notice of such redemption, which was signed by said complainant, and stated the capacity in which such attempted redemption was made, together with a description of the property, the judgment and execution under which the sale was made, and the claim that Clinton H. Carpenter was a successor in interest to a portion of said C. W. Carpenter's interest in said property, and one of the defendants in said action of foreclosure, a description of the judgment against Clinton H. Carpenter, the docketing of the same by the clerk of said court, and the alleged lien thereof on said realty, the assignment of such judgment to complainant, together with a copy of the docket of the judgment under which he claimed the right to redeem, which was certified by the clerk of said court, a copy of said assignment from Amos H. Carpenter, verified by said complainant, and his affidavit showing the amount then actually due on such alleged judgment lien, and also filed a duplicate notice of such alleged attempt to redeem in the office of the recorder of said San Joaquin county.

That said defendants admit that the said officer, Cunningham, refused, and ever since has refused, and still continues to refuse, to receive the money for the redemption of said property so tendered as aforesaid.

Defendants admit that at the time charged in the bill of complaint the complainant demanded of said officer a sheriff's deed of said real property such as is usually given in cases to a redemptioner, and admit that at the time

of said demand six months had elapsed from the time of the sale and that no judgment debtor had redeemed or offered to redeem from such sale.

Admit that said sheriff refused, and still continues to refuse, to give a deed thereof to said complainant, and admit that on the 16th day of November, 1894, the said officer, Cunningham, made, executed, and delivered to the said Myles P. O'Connor, as purchaser, a sheriff's deed of said property, in which it was stated and recited that no redemption from said mortgage sale had been made, and said defendants aver and charge that said statements and recitals so made in said deed are true.

Said defendants deny, upon and according to their information and belief, that said real property is of the value of $34,770.00, or of any greater value than about $12,800.00.

Defendants deny, upon their information and belief, that the defendant C. K. Bailey is wrongfully carrying on the partnership business formerly existing between Bailey & Carpenter.

Defendants deny that the said C. K. Bailey has nearly wrecked said estate or rendered the same nearly insolvent through alleged fraud or mismanagement, or by any act of said defendant Bailey, or has allowed said property to be sold for the purpose of defrauding the heirs at law of said Carpenter or any one else of their inheritance, or the complainant of the benefit of said supposed judgment lien, or that in pursuance of such alleged purpose, or in collusion with said sheriff, purchaser, and others, or in collusion with any person or persons, he caused

said alleged redemption to be prevented and refused, with the intention of securing said property again from the purchaser for himself or some member of his family after complainants' and said heirs' right of redemption had expired; or that there has been any collusion between the said C. K. Bailey and said sheriff, Cunningham, or with any one else, to prevent any person from redeeming said land from such mortgage sale.

Defendants deny that the annual rents and profits of said real property are of the value of about $1,825.00, or any greater value than about $1,000.00.

Deny that by reason of the alleged wrongful acts of said defendants, or any of them, complainant is unable to redeem said real property from said mortgage sale, or to enforce his alleged and supposed judgment lien against said Clinton H. Carpenter's portion of said real property as the supposed successor in interest to his brother's estate, or to get possession or title to said premises. And deny by reason thereof, or at all, said complainant has been damaged in the sum of $34,770.00, the alleged value of said real estate, at the time of his supposed redemption, or in any sum whatever, or that he has been damaged in the further or other sum of $1,825.00, the alleged value of the rents and profits thereof since the 15th day of May, 1894, up to the time of the commencement of this suit, or for any time or sum whatever. And deny that he

has been further damaged in the sum of $2,000.00 or any other sum, for attorney fees made or incurred therein.

Wherefore, said defendants pray that they may be hence dismissed wisth judgment for their costs in this behalf expended.

DUDLEY & BUCK,
Attorneys for said defendants.

In the Superior Court of the County of San Joaquin, State of California.

In the Matter of the Estate of C. W. CARPENTER, Deceased.
ABEL F. CARPENTER, et al.,
Contestants,
vs.
C. K. BAILEY et al.,
Proponents.

Whereas, a contest of the will of C. W. Carpenter is now pending and undetermined between the above-named contestants and proponents, and all parties interested in said contest agree that the same be settled, compromised, and terminated and further litigation thereunder prevented.

And whereas, the parties thereto are unable to agree upon the terms of settlement and compromise, and are

willing to submit the question of terms to Frank T. Baldwin for determination.

Now, therefore, in consideration of the premises, and in consideration of and for the purpose of avoiding and preventing further litigation in the matter of the said estate settling and determining the said contest, and in consideration of the mutual promises hereby made; it is hereby agreed by and between the said contestants and proponents, that the said matter shall be referred to Frank T. Baldwin as referee to fix and determine what, under all the circumstances of the case, is a reasonable, just and equitable amount or portion of the said estate to be set over to such contestants in full of all their claims of each and every of them.

He, the said referee, shall ascertain and determine the present net value of said estate; and for such purpose may take such steps as he may deem necessary. He shall fix and determine the value of the land of the said estate per acre and also the amount in money which the contestants are entitled justly and equitably to receive, and shall thereupon deliver his written statement thereof to the attorney of the respective parties to such contest.

The proponents shall have five days from and after the receipt of such statement in which to decide whether they will pay the contestants in land or money. If they elect to pay in land, there shall be made and delivered to said contestants' attorney in fact, A. H. Carpenter, within thirty days from the time of the exercise of such election, deeds of so much of said land as at the valuation fixed and determined by the said referee per acre, shall

make the amount found by the referee as the sum to be paid to such contestants which said land shall be in one parcel, and may be designated by the said referee; provided however, that the land deed shall not include any part of the west half of section 32 in township 3 north, range 9 east, M. D. M., nor any part of the home place, so called.

The said contestants and proponents hereby agree to be bound by the findings of said referee, and the said findings shall be binding upon each and every of them, and said parties may, and they are hereby given the right to, take any and all proper and legal steps and measures to enforce the full and perfect performance thereof, either to obtain the dismissal of said contest on the one part or the specific performance of this agreement upon the other.

That said referee shall be allowed for his services the sum of $250.00, and such sum in addition thereto as may be required to pay such expenses as may be incurred by him in and about the reference, which sums shall be paid out of the said estate.

None of the parties thereto shall have the right to offer any evidence before the said referee, but such referee, for the purpose of aiding him in determining the true condition and value of the said estate, may call for such statement from either party thereto, and take such evidence as to him shall seem necessary to a proper determination of the question hereby submitted to him.

In determining the amount to be allowed to the contestants, and in considering the claims against the said

estate, the referee shall also take into consideration the fact that a certain claim of C. K. Bailey, filed and approved in said estate for a note made by deceased in his lifetime, is contested for the same reasons and on the same grounds as made to the will.

In witness whereof, the said contestants and proponents have hereunto affixed their hands and seals, this day of May, 1893.

It is further stipulated and agreed, that if either or any of said parties refuse to conform to or abide by the decision of said referee, or carry out the provisions thereof, a decree may and shall be entered in the matter of the contested will herein, against the parties so refusing to abide by or carry out the decision of the said referee, and that said decree shall be entered against the party or parties so refusing the same as though said contest had been tried by a jury, and a verdict rendered against said party or parties so refusing to abide by or carry out said award.

Dated May , 1893.

L. M. Walker.
E. D. Middlekauf.
Addie M. Middlekauf.
Nettie O. Walker.
Hattie M. Bailey
Eddie F. Bailey.
C. K. Bailey.

A. H. CARPENTER,

Attorney in Fact for Contestants.

This agreement is signed by the said A. H. Carpenter upon the condition that the original contract shall be carried out, namely: That only the legal claims against said estate shall be considered, and the determination of the referee as to such legality shall be final and conclusive; that said referee shall designate the land to be received by the contestants; and that said Carpenter shall receive two span of good driving horses to be taken at appraised value as a part of such award.

May 24th, 1893.

A. H. CARPENTER.

Those horses that C. K. Bailey is in the habit of driving shall not be chosen by the said Carpenter.

State of California, }
County of San Joaquin. } ss.

Thomas Cunningham, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to such matters as are therein stated on information or belief, and as to those matters he believes it to be true.

THOS. CUNNINGHAM.

Subscribed andsworn to before me this 18th day of March, 1896.

[Seal] C. W. MILLER,

Notary Public in and for said State and County.

Due service of the within answer is hereby admitted this 26th day of March, 1896.

A. H. CARPENTER and L. W. ELLIOTT,
Atty. for Complainant.

[Endorsed]: Filed Mch. 30th, 1896. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit Northern District of California.

IN EQUITY.

BERNARD McGORRAY,
Complainant,

vs.

MYLES P. O'CONNOR, THOMAS CUNNINGHAM, C. K. BAILEY, E. F. BAILEY, ANDREW WOLF, R. GNEKOW, JOHN JACKSON, T. W. NEWELL, I. S. BOSTWICK, WILLIAM INGLIS and MOSES MARKS,
Defendants.

Replication to Answers.

The replication of Bernard McGorray, the above-named complainant, to the several answers of Myles P. O'Connor

and Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, G. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, William Inglis, and Moses Marks, defendants.

This replicant, saving and reserving to himself now and at all times, hereafter all and all manner of benefits and advantage of exception which may be had and taken to the manifold insufficiencies of the said answers, for replication thereto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that said answers of said defendants are uncertain, untrue, and insufficient to be replied unto by replicant without this; that any other matter or thing whatsoever, in the said answers contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the replicant is and will be ready to aver, maintain, and prove, as this Honorable Court shall direct, and humbly prays as in and by his said bill he hath already prayed.

L. W. ELLIOTT,
A. H. CARPENTER,
Solicitors for Complainant.

Received a copy of the within replication this 31st day of March, 1896.

DUDLEY & BUCK,
Attys. for Defendants Cunningham et al.

Sent a copy of the within to Warren Olney, by mail, this 31st day of March, 1896.

A. H. C.

[Endorsed]: Filed April 1st, 1896. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

BERNARD McGORRAY, Complainant,
vs.
M. P. O'CONNOR et al., Respondents.
No. 12022.

Enrollment.

The complainant filed his bill of complaint herein on the 6th day of December, 1894, which is hereto annexed.

A subpoena to appear and answer in said cause was thereupon issued, returnable on the 4th day of February, A. D. 1895, which is hereto annexed.

The respondents Cunningham et al appeared herein on the 4th day of February, 1895, by Messrs Dudley & Buck, Esqs., their solicitors.

On the 4th day of March, 1895, a demurrer was filed herein, which is hereto annexed.

On the 5th day of November, 1895, an alias subpoena ad respondendum was issued herein, returnable on the 2d day of December A. D. 1895, which is hereto annexed.

The respondent M. P. O'Connor appeared herein on the 2nd day of December, 1895, by Warren Olney, Esq., his solicitor.

On the 2d day of December, 1895, a demurrer of M. P. O'Connor was filed herein which is hereto annexed.

On the 2d day of March, 1896, an order overruling the demurrers was made and entered herein, a copy of which is hereto annexed.

On the 27th day of March, 1896, the answer of respondent M. P. O'Connor was filed herein, which is hereto annexed.

On the 30th day of March, 1896, the answer of respondents Cunningham et al was filed herein, which is hereto annexed.

On the 1st day of April, 1896, a replication to the answers of M. P. O'Connor and Cunningham et al was filed herein, which is hereto annexed.

Thereafter on the 12th day of April, 1897, a final decree was signed, filed, and entered herein, in the words and figures following, viz:

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

BERNARD McGORRAY,
Plaintiff,

vs.

MYLES P. O'CONNOR, THOMAS CUNNINGHAM, C. K. BAILEY, E. F. BAILEY, ANDREW WOLF, R. GNEKOW, JOHN JACKSON, T. W. NEWELL, I. S. BOSTWICK, WILLIAM INGLIS, and MOSES MARKS.
Defendants.

March term, 1897.

Final Decree.

This cause came on to be heard upon the bill of complaint filed herein and the respective answers of the defendants, and was argued by counsel and submitted to the Court for its decision and thereupon on this 12th day of April, 1897, upon consideration thereof it was ordered, adjudged, and decreed as follows, to-wit:

That the plaintiff, Bernard McGorray, is not entitled to any of the relief sought for in his said bill of complaint, and said bill of complaint is hereby dismissed.

It is further ordered, adjudged, and decreed that the defendants and each of them do have and recover his costs and disbursements in this behalf expended taxed at $18.00.

Dated April 12th, 1897.

WM. W. MORROW,
Judge.

[Endorsed]: Filed and entered April 12, 1897. W. J. Costigan, Clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Northern District of California.

BERNARD McGORRAY, Plaintiff,

vs.

M. P. O'CONNOR et al., Defendants.

Memorandum of Costs.

Disbursements of Defendant O'Connor.

Clerk's fees	$10
Reporter's fees	6 add by Clk.
Notary's fees	2
Total	$12
Taxed at	$18

W. J. COSTIGAN,
Clerk.

United States of America,
Northern District of California, } ss.
City and County of San Francisco.

Warren Olney, being duly sworn, deposes and says that he is solicitor for the defendant O'Connor in the above-entitled cause, and as such is better informed relative to the above costs and disbursements than the said O'Connor; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

WARREN OLNEY.

Subscribed and sworn to before me this 14th day of April, A. D. 1897.

W. J. COSTIGAN,
Clerk.

Clerk U. S. Circuit Court, Northern District of California.

To A. H. Carpenter,

You will please take notice that on Thursday, the 15th day of April, A. D. 1897, at the hour of 11 o'clock A. M. defendant O'Connor will apply to the clerk of said court, to have the within memorandum of costs and disbursements taxed pursuant to the rule of said court in such case made and provided.

WARREN OLNEY,
Solicitor for Defendant O'Connor.

Service of within memorandum of costs and disbursements, and receipt of a copy thereof, acknowledged this 15th day of April, A. D. 1897.

A. H. CARPENTER,
Attorney for Complainant.

[Endorsed]: Filed this 15th day of April, A. D. 1897. W. J. Costigan, Clerk.

Certificate to Enrollment.

Whereupon, said pleadings, subpoenas, copy of order, final decree and a memorandum of taxed costs are hereto annexed, said final decree being duly signed, filed, and enrolled pursuant to the practice of said Circuit Court.

Attest, etc.

[Seal] W. J. COSTIGAN,
Clerk.

[Endorsed]: Enrolled papers. Filed April 12th, 1897. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

IN EQUITY.

BERNARD McGORRAY, Complainant,
vs.
M. P. O'CONNOR et al., Respondents.
No. 12,022.

In Equity. Suit to obtain a decree canceling and declaring void a certain sheriff's deed to land sold upon foreclosure of a mortgage; to allow the complainant to redeem as a judgment creditor; and to direct the sheriff to execute and deliver a deed of the property to the complainant, etc.

L. W. ELLIOTT and A. H. CARPENTER, Solicitors for Complainant.

Messrs. OLNEY & OLNEY, and DUDLEY & BUCK, Solicitors for Respondents.

Opinion.

MORROW, District Judge.—In this action the complainant seeks to obtain the decree of this Court, canceling and declaring null and void a certain deed executed

and delivered by the respondent, Thomas Cunningham, as sheriff of San Joaquin County, to the respondent, Myles P. O'Connor, on the 16th of November, 1894, conveying to O'Connor the lands and premises described as the E. 1-2 and NW. 1-4 of the NE. 1-4 of section 5, T. 2 N., R. 8 east, and the SE. 1-4 and the E. 1-2 of the SW. 1-4 of section 32, T. 3 N., R. 8 east, Mount Diablo base and meridian, which land and premises were sold by the sheriff under and by virtue of a decree of foreclosure of a mortgage and order of sale made by the Superior Court of San Joaquin county on the 15th of May, 1894. The complainant also seeks the further decree of the Court, that he be allowed to redeem the land and premises from such sale in the character of a judgment creditor of one Clinton H. Carpenter, and that the sheriff make a deed of the property and deliver it to the complainant.

The case has been submitted upon the motion of both parties for a judgment upon the pleadings. It appears, from the complaint that on the 30th day of October, 1882, C. K. Bailey and C. W. Carpenter, doing business as copartners in San Joaquin county as farmers and stock-raisers under the name of Bailey and Carpenter, gave a mortgage on the premises above described to the defendant Myles P. O'Connor as security for the payment of $10,000.

On January 22d, 1884, C. W. Carpenter died, leaving an estate consisting largely of his half interest in the partnership property. He was an unmarried man, and, in a document purporting to be his last will and testament, he gave the bulk of his property to the children of C. K.

Bailey, his surviving partner, to the exclusion of his heirs at law. This will was admitted to probate and Bailey was appointed executor. The will was contested by Clinton H. Carpenter, a brother of the deceased, with whom, it appears, other brothers were associated, but their names are not given in the bill. The executor and legatees were defendants. Two trials were had before a jury, each trial resulting in favor of the contestants, and on each verdict the Superior Court entered a decree, revoking the probate of the will and declaring the petitioners in such contest the heirs at law of the deceased.

From each of the verdicts and decrees the executor and legatees appealed to the Supreme Court of the State of California, and said decrees were reversed and new trials granted. The contest over the will is still pending in the Superior Court of San Joaquin county. On the 10th of October, 1888, Myles P. O'Connor brought suit in the Superior Court of San Joaquin county against C. K. Bailey and Clinton H. Carpenter, as one of the alleged successors in interest of C. W. Carpenter, deceased, and other defendants, to foreclose the mortgage, and, on the 15th day of March, 1890, a decree of foreclosure and sale was made and entered in the Superior Court for the sum of $11,808.74 and costs. In the bill, it is alleged that this decree was "made and entered in said court and cause against C. K. Bailey and Clinton H. Carpenter and other defendants." On the 15th day of May, 1894, under the order of Court in the foreclosure suit, the mortgaged property was sold to the defendant Myles P. O'Connor at sheriff's sale

by the defendant Cunningham, and the sheriff's certificate of sale was delivered to O'Connor, and, on November 16th, 1894, the sheriff delivered to him the deed of conveyance which it is the object of this action to declare null and void and of no effect.

It appears, further, that, on the 15th day of September, 1894, Amos H. Carpenter recovered a judgment in the Superior Court of San Joaquin county against Clinton H. Carpenter for the sum of $12,438 damages and costs, and, on the same day, this judgment was docketed by the clerk of the court, so that it became a lien upon the property of Clinton H. Carpenter. On the 17th day of September, 1894, Amos H. Carpenter sold and transferred this judgment to the complainant in the present suit. After this assignment, and on the 18th of September, 1894, the complainant, in the capacity of a judgment creditor of Clinton H. Carpenter and claiming a lien on the interest of the latter in the mortgaged premises, tendered to the sheriff of San Joaquin county the sum of $12,777.05 for the redemption of the real estate from the mortgage sale. The sheriff refused the money from the complainant for the redemption of the property and refused to give him a deed therefor.

It is further alleged in the bill that, on the 24th day of May, 1894, Clinton H. Carpenter and other heirs at law of the deceased and the executor and legatees under the will entered into an agreement to arbitrate the matters in difference over said estate, and that such matters should be submitted to an arbitrator, who should determine, in his award, the value of contestants' interest in

said estate and how much the said Clinton H. Carpenter and other heirs at law of the deceased should receive from said estate as their share thereof; that such reference should in no way affect the controversy then pending over the will, but the same should continue pending in court and not be discontinued or dismissed until the award of such arbitrator should be fully performed and carried out; that the reference was made and the parties appeared before the arbitrator, who made his award, in which it was decreed and determined that the interest of Clinton H. Carpenter and other heirs in said estate was of the value of $11,256.24, and that they were entitled to receive that sum from the estate of the deceased; that the award has never been carried out or performed and is in full force and effect and binding upon all the parties interested in said estate.

To this complaint, a demurrer was interposed on the ground that the complainant had not stated such a cause of action as entitled him to the relief for the bill. The demurrer was argued before Judge McKenna and overruled. It is said that it was intimated from the bench that, but for the allegations of the bill that a judgment had been entered against Clinton H. Carpenter in the foreclosure proceedings, the demurrer would have been sustained. However that may be, an answer has been filed by the respondent O'Connor, in which it is denied that the judgment was against Clinton H. Carpenter for any sum of money whatsoever, or that any judgment against him was entered in the cause other than to cut off any supposed right of redemption of the real property described

in the mortgage, and that no personal judgment was taken in said action against any of the defendants except as against the defendant C. K. Bailey.

The answers of the respondents are sworn to and were filed March 26th, 1896, and, on the 1st of April, 1896, complainant filed his replication. The answers of the respondents are direct and positive in their denials of the material allegations of the bill, and as the complainant did not waive an answer under oath and as no testimony has been taken in support of the bill, the allegations of the answer, responsive to the bill, must be taken as true. (Slessinger v. Buckingham, 8 Saw. 470; Satterfield v. Malone, 35 Fed. Rep. 446; Walcott v. Watson, 53 Fed. Rep. 429; Vigel v. Hopp, 104 U. S. 441; Morrison v. Durr, 122 U. S. 518; Southern Development Co. v. Silva, 125 U. S.)

An effort appears to have been made by the complainant to avoid the effect of the answer by a motion to strike out certain portions of it, but notice of this motion was not given until June 29th, 1896, nearly three months after the replication had been filed and only two days before the expiration of the time for taking testimony as provided by Rule 69 of the Equity Practice. This motion has since been considered and denied, not only because it had not been made at the proper stage of the proceedings, but for the reason that the allegations proposed to be struck out were responsive to the allegations of the bill. But, aside from any question of pleading, the controlling question in the case is this, Was the complainant, in September, 1894, as the judgment creditor of Clinton H. Carpenter, entitled to redeem the land in question from the mort-

gage sale? The right of redemption, in this State, is given by statute and is conferred upon two classes: 1. The judgment debtor, or his successor in interest in the whole or any part of the property; 2. A creditor having a lien by judgment or mortgage on the property sold, or in some share or part thereof subsequent to that on which the property was sold. (Section 701, Code of Civil Procedure.) Can complainant's claim be maintained under the first subdivision of this statute? The mortgaged property was the partnership property of the firm of Bailey & Carpenter, and, under the law of this State, upon the death of one partner, the possession of the partnership interests vests exclusively in the surviving partner, who has the absolute power and control and disposition of the assets of the partnership. (Section 1585 Code Civil Proc.; Allen v. Hill, 16 Cal. 113, 118; Theller v. Such, 57 Cal. 447, 459.) It appears, from the bill, that the estate of Carpenter has not been distributed or separated from the partnership assets of Bailey & Carpenter, but is still in the hands of C. K. Bailey who, as surviving partner, still continues the partnership business. This fact alone is sufficient to dispose of any supposed right of redemption having thus far descended to the heirs of Carpenter. In Robertson v. Burrill, 110 Cal. 568, a partnership business was formed by Robertson & Burrill, for the purpose of engaging in the business of raising, buying, and selling stock, transacting a general farming business and dealing in real estate and other property. Robertson died and the business was continued by Burrill, the surviving partner, until his death. The heirs of Robertson then brought an action

against the administration of the estate of Burrill to compel an accounting, and for the appointment of a receiver to take charge of the Burrill estate, as being partnership property. A demurrer to the complaint in the court below was sustained. On appeal to the Supreme Court, the judgment was affirmed. In speaking of the right of the heirs to maintain an action for an accounting and settlement of a partnership between the decedent and a surviving partner, the Supreme Court said: "Plaintiffs are not the proper parties to maintain this action, and they have not the legal capacity to do so. While, in a sense, they are beneficiaries of the trust which resulted by the death of their father, the fulfillment of which was imposed upon the surviving partner, yet there were certain intermediate steps and processes necessary to be taken and followed before their beneficial interests could be reduced to possession. And it is these necessary processes which the action under consideration entirely ignores. For there was another trust intervening in time and right and duties between the close of the surviving partner's trust and their enjoyment of its fruits. It is true that as heirs of their father the title to his property, real or personal, vested in them, but their title did not carry with it the right to immediate enjoyment. The rights and duties of the administrator of their father's estate interposed and intervened. The administrator, also, is a trustee with well-defined duties, among the first of which is that of collecting the assets of the estate and paying its just debts after due notice to creditors. The heirs' title is subject to the

performance by the administrator of all his trusts, and they finally come into the possession and enjoyment of only such portion of the estate as may remain after the execution of them by the administrator. . . . . Whether the partnership assets consist of real or personal property, or both, is quite immaterial, since in every case it is made the duty of the surviving partner to account with the personal representative."

It is clear that, under the law as thus established in this State, the complainant has not succeeded to such an interest of the judgment in the whole or any part of the property as entitle him to redeem under the statute.

This determination disposes of the question of a judgment-lien, under the second subdivision of the statute, obtained by Amos H. Carpenter in September, 1894, on the property of Clinton H. Carpenter. As the latter had not succeeded to any interest in the mortgaged premises, either directly or by the terms of the award in his favor, there was nothing to which the judgment lien could attach.

A decree will be entered in favor of the respondents, and for their costs.

[Endorsed]: Filed April 12, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD McGORRAY,
Complainant,
vs.
MYLES P. O'CONNOR, et al.,
Defendants.

Complainant's First Bill of Exceptions.

Be it remembered that the respondents, on the 27 day of March, 1896, filed their respective answers herein, and on the 1st day of April, 1896, the complainant filed his replication to the respective answers and on the 14th day of July, 1896, the respondents served a notice upon the complainant that at the next calling of the term calendar they should move to set the cause down for trial upon bill and answers, and on the 17th day of July, 1896, the complainant in the above-entitled action filed in this Court, and duly served on the attorneys for each and all of the defendants herein, a notice of motion to strike the answers of said defendants from off the files of said cause, on the ground that said answers, and each of them, were not accompanied by certificate of counsel that it was well founded in point of law as required by Rule 10 of the Rules of Practice of this Court, which reads as follows to-

wit: "No demurrer or special plea or answer to a complaint shall be allowed to be filed, unless accompanied by a certificate of counsel that, in his opinion, it is well founded in point of law."

That said notice of motion is in words and figures as follows, to wit:

[Title of Court and Cause.]

"To the Defendants, and Warren Olney, and Dudley & Buck, their Attorneys:

You will please take notice that upon the calling of the general term calendar next after this date, or as soon thereafter as the matter can be heard, the complainant will move the above-named court to strike from off the files of said cause and court the answer of Myles P. O'Connor, and the answer of Thomas Cunningham and others, and also for an order of Court allowing a default to be entered against each and all of the defendants herein for want of an answer.

Said motion will be made upon the ground that neither of the two above-named answers were verified as required by Rule 59 of this court, and on the further ground that said answers, and each of them, were not accompanied by a certificate of counsel that it was well founded in point of

law, as required by Rule 10 of the Rules of Practice of this court.

Said motion will be made and based upon the papers, files, and records of said case.

Dated July 16, 1896.

L. W. ELLIOTT, and
A. H. CARPENTER,
Solicitors for Complainant."

That thereafter, on the 3d day of August, 1896, said motion came on regularly for hearing before the Hon. Joseph McKenna, as Judge of said court, and the same was argued by counsel for the respective parties to said action, and said motion was thereupon submitted to the Court for decision, and the same was denied by the Court. And the following is a copy of the order made by the said Court in that behalf as entered in the clerk's record thereof, to-wit:

[Title of Court and Cause.]

"Monday, August 3d,1896.

"In this cause, after argument by counsel for the respective parties, it was ordered that the motion to strike from files the answers of defendants O'Connor and Cunningham be and hereby are denied, with leave to said defendants to further verify their answers and add certificates if so advised."

That said defendants, and each of them, neglected and refused to avail themselves of the Court's said permission to file answers as provided in the aforesaid order, and on

the 27th day of March, 1897, the said complainant filed in this court and on the 26th day of March, 1897, duly served on the attorneys for each and all of the defendants herein, a second notice of motion, to strike said pretended answers from off the files of said cause on the same grounds as specified in the motion last above named, and on the additional ground that said defendants had not, nor had any or either of them, availed themselves of the permission theretofore granted by the Court by filing answers which should conform to said rules of Court; that said notice of motion is in words and figures as follows, to-wit:

[Title of Court and Cause.]

"To the Defendants, and Warren Olney, and Dudley & Buck, their Attorneys:

"You will please take notice that on Wednesday, the 31 day of March, 1897, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-named Court, in the city and county of San Francisco, State of California, the complainant herein will move the above-named court to strike from off the files of said cause the answer of Myles P. O'Connor, and the answer of Thomas Cunningham et al., and also for an order of Court allowing a default to be entered against each and all of the defendants herein, for want of an answer.

Said motion will be made upon the ground that neither of the above-named answers were accompanied by a cer-

tificate of counsel that said answers or either of them were well founded in point of law as required by rule 10 of the Rules of Practice of this court, and on the further ground that said defendants have not, nor has any or either of them, filed new answer or answers conforming to the rules of this court, in accordance with the order of court heretofore made herein, on or about the 3d day of Aug., 1896. Said motion will be made and based upon the affidavit of A. H. Carpenter, hereto attached and served, and upon the papers, files, and records of said case.

L. W. ELLIOTT, and
A. H. CARPENTER,
Solicitors for Complainant.

State of California, } ss.
County of San Joaquin. }

A. H. Carpenter, being duly sworn, says that he is one of the solicitors for the complainant in the above-entitled action; that on or about the 3d day of August, 1896, the complainant herein moved the above-named Court to strike from off the files of this cause each and all of the pretended answers filed herein, on the ground that said answers, and each of them, did not conform with the requirements of the rules of this court, because they were not accompanied by a certificate of counsel that said answers were well founded in point of law; that said motion was temporarily denied by said Court, and leave was granted said defendants, and each of them, to file an-

swers which should conform to the requirements of the rules of said Court; that said defendants, and each and all of them, have failed and neglected to comply with said order, and there are now no valid or lawful answers on file in this cause; that said pretended answers were wrongfully filed and in direct violation of the Rules of Practice of this court as provided in Rule 10 thereof.

A. H. CARPENTER.

Subscribed and sworn to before me this 25th day of March, 1897.

[Seal] C. L. FLACK,

Notary Public in and for said County and State."

That thereafter, on the 31st day of March, 1897, said motion came on regularly for hearing before the Hon. W. W. Morrow, acting Judge of said court, and the same was argued by counsel for the respective parties to said action, and was submitted to the court for decision. The Complainant read to the Court the aforesaid affidavit of A. H. Carpenter, and urged all the grounds set forth in the foregoing notices for the granting of said motion. The defendants objected to the granting of complainant's motion on the ground that said Rules of Practice did not require any certificate of counsel to an answer on the merits. The Court thereupon denied said motion to strike the answers from off the files of said case, but gave no reason for the decision; to which ruling of the Court the counsel for the complainant then and there excepted; that said order of Court as entered in the clerk's records is in words and figures as follow, to-wit:

[Title of Court and Cause.] No. 12022.

"Wednesday, March 31, 1897.

"Complainant's motion filed herein on the 27th instant, to strike the answers of said defendants, O'Connor and Cunningham et al. from the files, and for default, was submitted to the Court, and it is ordered that the said motion be and hereby is denied, and complainant allowed an exception to this ruling."

Be it remembered that on the 29th day of June, 1896, the complainant herein filed in this court, and duly served on the attorneys for each and all of the defendants, a notice of motion to strike out certain portions of the answers of the defendants O'Connor and Cunningham and others, on the ground that such portions were, and each and every part thereof was, sham, redundant, and conclusions of law, as more fully appears in the notice thereof, which is in words and figures as follows, to wit:

[Title of Court and Cause.]

"To the Defendants and Warren Olney, and Dudley & Buck, their Attorneys:

"You will please take notice that on Monday, the 6 day of July, 1896, at the hour of 11 o'clock A. M. of said day, or as soon thereafter as counsel can be heard at the court-room of the above-named court, in the city and county of San Francisco, State of California, the above-named complainant will move said Court for judgment on the plead-

ings, and also to strike out from the answer of Myles P. O'Connor all of the following allegations, to-wit: All that portion of said answer found on lines 22 to 27, inclusive, of page 8; all on lines 12 to 17, inclusive, page 9 thereof; all on line 30 of page 9 commencing with the word 'he,' and all on lines 1 to 8, inclusive, page 10; all on lines 1 to 6, inclusive, page 11 thereof; all on lines 7 to 28, inclusive, page 11 thereof; all on lines 1 to 5, inclusive, page 12 thereof; and to strike out from the answer of Thomas Cunningham and others all of the following words and allegations, to-wit, all on lines 12 and 13, page 2, of said answer commencing with the word 'and' and said line 12; all on line 22, page 4, to and including line 22 on page 5 thereof; all on lines 3, page 6, commencing with 'but,' to and including line 9 on page 6; all of line 6 to 10, inclusive, page 7 thereof; all on line 16, page 7, commencing with the word 'but,' up to and including line 22 same page.

Said motion will be made on the ground that all of the allegations above described and referred to are, and each of them is, sham, irrelevant, and redundant, and of such a character that said defendants cannot be heard to urge the same as a defense herein, having no interest in the matter, save the amount of the mortgage note, and will be based on the papers, files, and records of said cause.

L. W. ELLIOTT,

A. H. CARPENTER,

Attorneys for Complainant."

That said motion came on regularly for hearing on said 6th day of July, 1896, and was, without any objection or exception being made thereto, continued by the Court to the 3d day of Aug., 1896, when counsel for the respective parties duly appeared in court and argued said motion on its merits, and, by order of Court, said motion and matters therein contained were submitted to the Court on briefs to be filed thereafter; that said order of Court, as entered in the clerk's records, is in words and figures as follow, to-wit:

[Title of Court and Cause.] No. 12022.

"Monday, Aug. 3d, 1896.

"It is further ordered that the motion to set the cause for hearing upon bill and answer be, and hereby is, denied, and that the motion to strike out parts of the answers of defendants O'Connor and Cunningham, and the motion for judgment on the pleadings be, and they are, submitted upon briefs; complainant to file brief within 20 days, defendant to file brief within 20 days thereafter, and complainant to file reply brief within 10 days thereafter."

That thereafter said order of submission was revoked by the Court, and said motion, at the request of counsel for the defendants, came on for hearing on its merits on the 31st day of March, 1897, before the Hon. W. W. Morrow, acting Judge of said court, and the same was argued by counsel for the respective parties to said action, and was submitted to said Court for decision. That complainant urged that said motion be granted on the grounds

stated in the aforesaid notice. The Court thereupon denied said motion and each and every part thereof; to which opinion and ruling of the Court the counsel for the complainant then and there excepted. That said order of Court, as entered in the clerk's record, is in words and figures, to-wit:

[Title of Court and Cause.] No. 12022.

"Wednesday, March 31, 1897.

"It is ordered that the order of the 15th instant, submitting complainant's motion to strike out parts of answers of defendants, and for judgment on the pleadings herein be, and the same is hereby, vacated and set aside, complainant's motion to strike out portions of the answer of defendant O'Connor, and to strike out portions of the answer of defendants Cunningham, et al., was thereupon argued by A. H. Carpenter, Esq., for complainant, and by Warren Olney, and W. L. Dudley, Esqs., for the defendants, and submitted to the Court; and the same having been considered it was ordered that said motion be, and hereby is, denied, and complainant allowed an exception to the foregoing ruling.

Assignment of Errors.

The complainant makes, assigns, and relies on the following errors, to-wit:

I.

It was error to deny the complainant's second motion to strike defendants' answers, and each of them, from off the files of said cause.

2.

It was error to deny the complainant's motion to strike out the said several portions from the answers of the said defendants.

The foregoing constitute the complainant's bill of exceptions to be used on appeal herein; and complainant prays that the same may be allowed and certified as correct.

L. W. ELLIOTT,
A. H. CARPENTER,
Solicitors for Complainant.

The foregoing bill of exceptions is hereby allowed and settled as correct.

Dated April 27th, 1897.

WM. W. MORROW,
Judge.

[Endorsed]: Filed April 27th, 1897. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD McGORRAY,
Complainant,
vs.
MYLES P. O'CONNOR et al.,
Defendants.

Complainants' Second Proposed Bill of Exceptions.

Be it remembered that on the third day of August, 1896, when the pleadings herein were undetermined and the issues raised by the bill of complaint, and the answers of the defendants were unsettled, by reason of complainant's motion, then pending on its merits, to strike said answers, and each and all of them, from off the files of said cause, and by reason of a second motion by complainant, then pending on its merits, from judgment on the pleadings, and by reason of a third motion by complainant then pending on its merits to strike out large portions of said answers and each of them, on the ground that such portions were sham, redundant, and conclusions of law, the defendants O'Connor and Cunningham, and others, moved the Court, on motion duly made and given to set said

action for hearing on bill and answers. Said notice of motion is in words and figures as follows, to-wit:

[Title of Court and Cause.]

"The complainant and his solicitors will please take notice that upon the calling of the general term calendar next after this date we shall move the Court to set down the above-entitled action for hearing upon the bill and the answers of the respondents thereto. Said motion will be made upon the ground that the complaint has taken no evidence within the time allowed by the rule of the court or by law, and that said cause is ready for submission upon the bill and answers thereto.

Dated July 13, 1896.

WARREN OLNEY,
DUDLEY & BUCK,
Solicitors for Respondents.

That said motion came on regularly for hearing before the Hon. Joseph McKenna, Judge of said court, and the same was argued by counsel for the respective parties to the said action, and was thereupon submitted to said Court for decision, and the same was denied by the Court on the ground that the issues in the case were unsettled.

That said order of Court, as entered in the clerk's records, is in words and figures as follows, to-wit:

[Title of Court and Cause.] No. 12022.

"Monday, August 3, 1896.

"In this cause, after argument by counsel for the respective parties, it was ordered that the motions to strike from the files the answers of the defendants O'Connor and Cunningham be, and hereby are, denied, with leave to said defendants to further verify their answers and add certificates if so advised. It is further ordered that the motion to set the cause for hearing upon the bill and answers be, and hereby is, denied, and that the motion to strike out parts of the answers of defendants O'Connor and Cunningham, and the motion for judgment on pleadings be, and they are, submitted upon briefs; complainant to file brief within 20 days, defendants to file briefs within 20 days thereafter, and complainant to file reply brief within 10 days thereafter."

That thereafter, on the 31st day of March, 1897, while said issues were unsettled and undetermined by reason of the pendency of complainant's said motions hereinbefore referred to and hereinafter set forth in full, the defendants herein, without permission or leave of Court, renewed, under precisely the same circumstances as existed in the first instance, their said motion to set said action for hearing on bill and answers which had already been denied as hereinbefore set forth, said notice of motion was duly made and served, and is in the words and figures as follows, to-wit:

[Title of Court and Cause.]

"The complainant and his solicitors will please take notice that the trial of the above-entitled action was at the beginning of this term set down for the 23d day of March, 1897.

"You will further take notice that upon the calling of said case for trial the defendants will insist upon the submission of the case upon the bill and answers on file herein, and that the Court then and there deny the complainant's motion to strike out portions of the answer, and for judgment on the pleadings. Please govern yourselves accordingly.

"Dated March 17th, 1897.

"WARREN OLNEY,
"OLNEY & OLNEY,
"Solicitors for Defendant M. P. O'Connor.
"DUDLEY & BUCK,
"Attorneys for all the Defendants except O'Connor."

[Endorsed]: Filed March 31st, 1897. W. J. Costigan, Clerk.

That the complainant's said three motions (pending on their merits at the time the defendants' first and second motion to set said cause for hearing on bill and answers were made), including notices thereof which were duly made and filed and served upon the attorneys for each and all of said defendants are in the words and figures as follows, to-wit:

[Title of Court and Cause.]

"To the Defendants and Warren Olney, and Dudley & Buck, their Attorneys:

You will please take notice that on Monday, the 6th day of July, 1896, at the hour of 11 o'clock, A. M., of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-named court, in the city and county of San rancisco, State of California, the above-named complainant will move said Court for judgment on the pleadings and also to strike out from the answer of Myles P O'Connor all of the following allegations, to-wit: All that portion of said answer found on lines 22 to 27, inclusive, of page 8; all on lines 12 to 17, inclusive, page 9 thereof; all on line 30 of page 9, commencing with the word 'he,' and all on lines 1 to 8, inclusive, page 10; all on lines 1 to 6, inclusive, page 11 thereof; all on lines 7 to 28, inclusive, page 11 thereof; all on lines 1 to 5, inclusive, page 12 thereof; and to strike out from the answer of Thomas Cunningham and others all of the following allegations and words to-wit: All on lines 12 and 13, page 2 of said answer, commencing with the word 'and' on said line 12; all on line 22, page 4, to and including line 22, on page 5 thereof; all on line 3, page 6, commencing with 'but,' to and including line 9 on page 6; all on line 6 to 10, inclusive, page 7 thereof; all on line 16, page 7, commencing with the word 'but,' up to and including line 22, same page.

"Said motion will be made on the ground that all the allegations above described and referred to are, and each

of them is, irrelevant and redundant, and of such a character that the said defendants cannot be heard to urge the same as a defense herein, having no interest in the matter, save the amount of the mortgage note, and will be based upon the files, papers, and records of said cause.

"L. W. ELLIOTT,
A. H. CARPENTER,
"Attorneys for Complainant."

[Endorsed]: Filed June 29th, 1896. W. J. Costigan, Clerk.

[Title of Court and Cause.]

"To the Defendants, and Warren Olney and Dudley & Buck, their Attorneys:

You will please take notice that on Wednesday, 31st day of March, 1897, at the hour of 10 o'clock, A. M., of said day, or as soon thereafter as counsel can be heard at the courtroom of the above-named court, in the city and county of San Francisco, State of California, the complainant herein will move the above-named court to strike from off the files of said cause the answer of Myles P. O'Connor, and the answer of Thomas Cunningham and others, and also for an order of Court allowing a default to be entered against each and all of the defendants herein for want of an answer. Said motion will be made upon the ground that neither of the above-named answers were accompanied by a certificate of counsel that said answers or either of them were well founded in point of law as required by Rule 10 of the Rules of Practice of this court,

and on the further ground that said defendants have not, nor has any or either of them, filed new answer or answers conforming to the rules of this court in accordance with the order of Court heretofore made herein on or about the 3d day of August, 1896. Said motion will be made and based upon the affidavit of A. H. Carpenter hereto attached and served, and upon the papers and files and records of said case.

"L. W. ELLIOTT,
"A. H. CARPENTER,
"Solicitors for Complainant."

County of San Joaquin. } ss.
State of California, }

A. H. Carpenter, being duly sworn, says that he is one of the solicitors for the complainant in the above-entitled action; that on or about the 3d day of August, 1896, the complainant herein moved the above-named court to strike from off the files of this cause each and all of the pretended answers filed herein, on the ground that said answers, and each of them, did not conform with the requirements of the rules of this court, because they were not accompanied by a certificate of counsel that said answers were well founded in point of law; that said motion was temporarily denied by said Court, and leave was granted said defendants, and each of them, to file answers which should conform to the requirements of the rules of said Court; that said defendants, and each and all of them, have failed and neglected to comply with said order, and there are now no valid or lawful answers on

file in this cause; that said pretended answers were wrongfully filed in direct violation of the rules of practice of this court as provided in Rule 10 thereof.

A. H. CARPENTER,

Subscribed and sworn to before me, this 25th day of March, 1897.

[Seal] C. L. FLACK,

Notary Public in and for said County and State."

That defendants' said second motion to set said action for hearing on bill and answers, and complainant's said three motions, affecting the defendant's answers, and the issues raised thereby, came regularly on for hearing before the Hon. W. W. Morrow, acting Judge of said court, and, after argument by counsel for the respective parties thereto, the same were submitted to the Court for decision.

The complainant objected to the granting of the defendants' said second motion to set said cause for hearing on bill and answers on the ground that said motion had already been made and denied by the Court; that it was renewed without leave of Court under the same circumstances as existed at the time the said motion was first made; that the issues herein were not settled within the meaning of the rule until all of complainant's aforesaid motions affecting said pleadings, and the issues therein, were disposed of, and the complainant should be allowed at least three months from the date of such disposition in which to take testimony.

The Court thereupon took said motion of defendant's to set said cause for hearing on bill and answers under advisement, and on the 12th day of April, 1897, granted said motion, and ordered said cause to be heard on bill and answers, and thereby refused to allow complainant to take testimony in support of his bill of complaint; to which order and ruling of the Court counsel for complainant then and there excepted.

That on said 31st day of March, 1897, complainant's motion for judgment on the pleadings was also duly submitted to the Court for decision after argument by counsel for the respective parties thereto, and the same was taken under advisement by the Court. The complainant urged all the grounds set forth in the written notice thereof as above set forth.

The Court, on the 12th day of April, 1897, denied said motion, on the ground that the facts stated in the complaint were not sufficient to warrant a judgment in favor of the complainant, to which ruling and opinion of the Court, counsel for complainant then and there excepted.

That said order of Court upon defendants' second motion to set said cause for hearing on bill and answers and complainant's motion for judgment on the pleadings, as entered in the clerk's records, is substantially as follows, to-wit:

[Title of Court and Cause.] No. 12022.

"Monday, April 12th, 1897.

"On motions heretofore submitted, a written opinion was filed by the Court. It is ordered that complainant's

motion for judgment on the pleadings be denied, and an exception allowed the complainant to the foregoing ruling. It is also ordered that defendants' motion to set cause for hearing on bill and answers be granted, and an exception is allowed the complainant to the foregoing ruling. It is also ordered that complainant's bill be dismissed, and defendants have a decree for their costs, and an exception is allowed the complainant thereto.

"That complainant's motion to strike out portions of the answers of said defendants, and his motion to strike said answers from off the files of said cause, were denied at the time of their submission, on the 31st day of March, 1897, and twelve days before the defendants' motion to set cause for hearing on bill and answers was granted.

Assignment of Errors.

The complainant makes, assigns, and relies on the following errors, to-wit:

1. It was error to entertain defendants' motion to set action for hearing on bill and answers when once denied and renewed, without leave of Court, under the same circumstances as existed when first made.

2. It was error to grant defendants' motion to set action for hearing on bill and answers when it had already been denied under the same circumstances as then existed.

3. It was error to set said motion down for hearing on bill and answers before the issues raised by the pleadings were settled.

4. It was error to set said action down for hearing on bill and answers without allowing the complainant a reasonable time from the date of the settlement of said issues to take testimony in support of his bill of complaint.

5. It was error to set said action down for hearing on bill and answers without giving the complainant three months' time from the disposal of said three several motions affecting the issues raised by said pleadings in which to take testimony in support of his bill.

6. It was error to deny complainant's motion for judgment on the pleadings.

7. It was error to hold that the sheriff, as an executive officer having no interest in the matter in controversy, could deny the material allegations of the bill, and thereby contest the complainant's right to redeem.

8. It was error to hold that the defendant O'Connor, mortgagee, having no interest in the matter in controversy, save the amount of his mortgage note, could deny the material allegations of the complaint, and thereby contest the complainant's right to redeem.

9. It was error to hold that the defendant O'Connor, mortgagee, having made Clinton H. Carpenter a party defendant to his suit of foreclosure, and a defendant in execution therein, was not estopped from denying said Clinton and his creditor's right to redeem.

10. It was error to hold that complainant's motion to strike out portions of the defendant's answers was made too late, and that it was not made at the proper stage of the proceedings.

11. It was error to hold that all or any part of the answers of the defendants, which the complainant moved to strike out, were proper or material allegations, because responsive to the bill.

12. It was error to hold that the title to C. W. Carpenter's interest in the realty of the firm of Bailey & Carpenter did not vest in his heirs at law at his death.

13. It was error to hold that Clinton, as an heir at law of C. W. Carpenter, had no interest in the mortgaged property because the estate had not been distributed.

14. It was error to hold that Clinton H. Carpenter, as defendant in the action of foreclosure, and a defendant in execution therein, had no right to redeem the mortgaged property.

15. It was error to hold that a person, having an interest in mortgaged property, could not redeem it from such mortgage sale.

The foregoing constitute the complainant's second proposed bill of exceptions to be used on appeal herein; and complainant prays that the same may be allowed, and certified as correct.

L. W. ELLIOTT,
A. H. CARPENTER,
Solicitors for Complainant.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD McGORRAY,
Complainant,
vs.
MYLES P. O'CONNOR et al.,
Defendants.

Affidavit of Service.

State of California,
County of San Joaquin. } ss.

A. H. Carpenter, being duly sworn, says that he is one of the solicitors for the complainant in the above-entitled action, and that he resides at the city of Stockton, California; that Warren Olney is the attorney for one of the defendants, O'Connor, in said cause, and that he, said Olney, resides in the city and county of San Francisco, said State, and has an office at the intersection of Bush and Sansome street in said city of San Francisco; that in each of the two places there is a United States postoffice, and that between the said two places there is a regular daily communication by mail; that on the 19th day of April, 1897, deponent served a true copy of the attached, "Complainant's Second Proposed Bill of Exceptions" on said Warren Olney, by depositing such copy on such date

in the postoffice at said Stockton, properly inclosed in an envelope, addressed to "Warren Olney" at his office aforesaid, the postage prepaid thereon.

A. H. CARPENTER.

Subscribed and sworn to before me this 19th day of April, 1897.

[Seal] C. L. FLACK,

Notary Public in and for the said County of San Joaquin, State of California.

Received a copy of the complainant's within proposed bill of exceptions the 19th day of April, 1897.

DUDLEY & BUCK,
Attorneys for Respondent Cunningham.

[Endorsed]: Filed April 21st, 1897. W. J. Costigan, Clerk.

The foregoing bill of exceptions is hereby allowed and settled as correct.

Dated April 27th, 1897.

WM. W. MORROW,
Judge.

[Endorsed]: Settled and refiled April 27th, 1897. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD McGORRAY,
Complainant and Appellant,
vs.
MYLES P. O'CONNOR, THOMAS CUNNINGHAM, C. K. BAILEY, E. F. BAILEY, ANDREW WOLF, R. GNEKOW, JOHN JACKSON, T. W. NEWELL, I. S. BOSTWICK, WM. INGLIS, and MOSES MARKS,
Defendants and Respondents.

Notice of Appeal and Order Allowing the Same

The above-named complainant, Bernard McGorray, receiving himself aggrieved by the orders of Court made and entered herein on the 31st day of March, 1897, and the 12th day of April, 1897, and the final judgment and decree made and entered on the 12th day of April, 1897, in the above-entitled proceeding, doth hereby appeal from said orders of Court and final decree to the United States Court of Appeals for the Ninth Circuit, and he prays that this his appeal herein may be allowed; and that a transcript of the record and proceedings and papers upon which said orders and final decree were made, duly au-

thenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Sept. 21, 1897.

L. W. ELLIOTT,
A. H. CARPENTER,

Solicitors for the Complainant and Appellant Bernard McGorray.

And now on this 21st day of September, 1897, it is ordered that the appeal be allowed as prayed for herein, and the amount of the bond to be given by appellant is hereby fixed at the sum of $500.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed September 21, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

BERNARD McGORRAY,
Complainant and Appellant,

vs.

MYLES P. O'CONNOR, THOMAS CUNNINGHAM, C. K. BAILEY, E. F. BAILEY, ANDREW WOLF, R. GNEKOW, JOHN JACKSON, T. W. NEWELL, I. S. BOSTWICK, Wm. INGLIS, and MOSES MARKS,
Defendants and Respondents.

Assignment of Errors in the U. S. C. C. for the Ninth Circuit.

Now, on this 21st of September, in the year of our Lord, one thousand eight hundred and ninety-seven, in the city of San Francisco, State of California, comes the said Bernard McGorray, by L. W. Elliott and Amos H. Carpenter, his solicitors, and says that in the record and proceedings in the above-entitled action there is manifest error in this, namely:

I.

It was error to deny complainant's second motion to strike the answers from off the files and allow a default against the defendants, as each and all of them had refused to avail themselves of the Court's permission to add a certificate of counsel to their several answers in accordance with the requirements of the rules of Court.

II.

It was error to deny complainant's motion to strike out the said several portions from the answers of Myles P. O'Connor and Thomas Cunningham et al., the same being sham, irrelevant, and of such a character that none of said defendants could be heard to urge such allegations as a defense herein.

III.

It was error to entertain and grant defendants' motion to set said action for hearing on bill and answers when once denied and renewed, without leave of Court, under the same circumstances as existed when first made.

IV.

It was error to set said motion down for hearing on bill of complaint and answer before the exceptions to such answers and the issues thereby were settled.

V.

It was error to set said action down for hearing on bill of complaint and answers, without allowing the complainant a reasonable time after the disposal of the exceptions to said several answers and after the settlement of the issues raised thereby in which to take testimony in support of his bill of complaint.

VI.

It was error to set said action down for hearing on bill of complaint and answers, without allowing the complainant three months time from the disposal of said motions to strike said answers from off the files, to strike out the sham, redundant, and irrelevant matter contained in said answers and for judgment on the pleadings.

VII.

It was error to deny complainant's motion for judgment on the pleadings.

VIII.

It was error to hold that complainant's said several motions were not made at the proper stage of the proceedings, or that they were made too late, as the rules of Court specify no time within which such motions must be made, and as a general appearance therein and a con-

sent to a continuance thereof, and the setting the motions down for hearing on the merits, without raising the objection, and the failure to move to strike the same from off the files, was a waiver of such an objection.

IX.

It was error to hold that all or any part or portions of the said several answers of the defendants objected to by the complainant as sham, redundant, irrelevant, and conclusions of law were proper or material allegations, because responsive to the bill of complaint.

X.

It was error to hold that the sheriff, as an executive officer having no interest in the matter in controversy, had the right to deny the material allegations of the bill of complaint, and thereby contest the complainants' right to redeem.

XI.

It was error to hold that the defendant O'Connor, mortgagee, having no interest in the matter in controversy save the amount invested in his mortgage note, had a right to deny the material allegations of the bill, and thereby contest the complainant's right to redeem.

XII.

It was error to hold that the defendant O'Connor, mortgagee, having made Clinton H. Carpenter a party defendant to his action foreclosing the mortgage and a defendant in execution therein, was not estopped from denying said Clinton and his creditor's right to redeem.

XIII.

It was error to hold that the title to C. W. Carpenter's, deceased, interest in the real property of the firm of Bailey & Carpenter did not vest in Clinton H. Carpenter, one of his heirs at law, at the time of his death.

XIV.

It was error to hold that the title to C. W. Carpenter's interest in the real property of the firm of Bailey & Carpenter vested in C. K. Bailey, the surviving partner of said late firm, and not in said Carpenter's heirs at law.

XV.

It was error to hold that Clinton H. Carpenter, as an heir at law of C. W. Carpenter, deceased, or his creditor, had no interest in the mortgaged property of his late brother, and no right to redeem the same from the mortgage sale, because said estate had not been distributed to him as such heir.

XVI.

It was error to hold that Clinton H. Carpenter, as a defendant in the action of foreclosure, and a defendant in execution therein, or his creditor, had no right to redeem the mortgaged property.

XVII.

It was error to hold that a person, having either a vested or contingent interest, however slight, in mortgaged property, cannot redeem it from a mortgage sale, if the mortgagee or sheriff, making the sale thereof, objects to such redemption.

XVIII.

It was error to render a decree in behalf of defendants, the Court having set said action down for hearing on bill and answers, because all matters and allegations in said answers contained that were not responsive to the bill, or that were made on information or belief, or that were not positive, or that were allegations or denials of conclusions of law, could not be taken, treated, or considered as evidence on such a hearing

XIX.

It was error to order a decree for the defendants upon the hearing on bill and answers, after excluding from con-

sideration those portions of said answers that were conclusions of law, irresponsive, and not positive allegations and denials, and those allegations made on information or belief, and leaving the material allegations of the bill, and the charges of collusion and conspiracy therein contained, undenied.

Wherefore, the said Bernard McGorray prays that the orders and final decree of the United States Circuit Court, Ninth Judicial Circuit, for the Northern District of California, be reversed, and that the United States Circuit Court of Appeals for the Ninth Circuit direct the entry of a decree below in favor of complainant and appellant, which will finally dispose of all matters of litigation herein as by law provided in actions of equity.

L. W. ELLIOTT,
A. H. CARPENTER,
Solicitors for Appellant.

[Endorsed]: Filed Sept. 21, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to-wit, the July term, A. D. 1897, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Tuesday, the 21st day of September, in the year of our Lord, one thousand eight hundred and ninety-seven.

Present, Honorable WILLIAM W. MORROW, Circuit Judge.

BERNARD McGORRAY
vs. } No. 12022.
M. P. O'CONNOR, et al.

Minute Order Allowing Appeal.

Upon motion of A. H. Carpenter, Esq., counsel for complainant, and upon the filing of a petition for appeal together with an assignment of errors, it is ordered that an appeal be, and hereby is, allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree heretofore filed and entered herein, and that the amount of the bond upon said appeal be, and hereby is, fixed at the sum of $500.

Bond on Appeal.

Know All Men by These Presents, that we, Bernard McGorray, as principal, and C. L. Flack and G. M. Pock,

as sureties, are held and firmly bound unto Myles P. O'Connor, Thomas Cunningham, C. L. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, their certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23d day of September, in the year of our Lord, one thousand eight hundred and ninety-seven.

Whereas, lately at a term of the Circuit Court of the United States, for the Northern District of California, in a suit depending in said court between Bernard McGorray, complainant, and Myles P. O'Connor, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, defendants, a decree was rendered against the said Bernard McGorray, and the said Bernard McGorray having obtained from said Court an allowance of his appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Myles P. O'Connor, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 27th day of October, 1897, next.

Now, the condition of the above obligation is such, that if the said Bernard McGorray shall prosecute his appeal

to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

BERNARD McGORRAY, [Seal]
C. L. FLACK. [Seal]
G. M. POCK. [Seal]

JOSEPH H. BUDD,
Judge of Superior Court, San Joaquin County, California.

United States of America,
Northern District of California,
State of California,
County of San Joaquin. } ss.

C. L. Flack and G. M. Pock, being duly sworn, each for himself deposes and says that he is a householder in said district, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Subscribed and sworn to before me this 24th day of September, A. D., 1897.

C. L. FLACK.
G. M. POCK.
JOSEPH H. BUDD,
Judge of Superior Court, San Joaquin County, California.

Sufficiency of securities approved.

JOSEPH H. BUDD,
Judge of Superior Court, San Joaquin County, California.

Form of bond and sufficiency of sureties approved.

WM. W. MORROW,
Judge.

[Endorsed]: Filed Sept. 28, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California.

BERNARD McGORRAY,
Complainant,

vs.

MYLES P. O'CONNOR, THOMAS CUNNINGHAM, C. K. BAILEY, E. F. BAILEY, ANDREW WOLF, R. GNEKOW, JOHN JACKSON, T. W. NEWELL, I. S. BOSTWICK, WM. INGLIS, and MOSES MARKS,
Defendants.

No. 12022.

Clerk's Certificate to Transcript.

I, Southard Hoffman, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing pages, numbered from 1 to 99, in-

clusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $60.20, and that said amount was paid by A. H. Carpenter, solicitor for complainant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 25 day of October, A. D. 1897.

[Seal] SOUTHARD HOFFMAN,

Clerk United States Circuit Court, Northern District of California.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Myles P. O'Connor, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 27th day of October, 1897, pursuant to an order allowing an appeal duly entered and of

record in the clerk's office of the Circuit Court of the United States, for the Ninth Circuit Northern District of California, wherein Bernard McGorray is appellant and you are appellees, to show cause, if any there be, why the orders and decree rendered against the said appellant as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WM. W. MORROW, Judge of the United States Circuit Court for the Ninth Circuit, Northern District of California, this 28th day of September, A. D. 1897.

WM. W. MORROW,
Circuit Judge.

Service of the within citation is hereby acknowledged this 28th day of September, 1897.

WARREN OLNEY, per M.,
Attorney for the Defendant Myles P. O'Connor.

Service of the within citation is hereby acknowledged this 29th day of September, 1897.

DUDLEY & BUCK,

Attorneys for the Defendants Thos. Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks.

[Endorsed]: Filed October 7, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

[Endorsed]: No. 407. In the United States Circuit Court of Appeals for the Ninth Circuit. Bernard McGorray, Appellant, v. Myles P. O'Connor, Thomas Cunningham, C. K. Bailey, E. F. Bailey, Andrew Wolf, R. Gnekow, John Jackson, T. W. Newell, I. S. Bostwick, Wm. Inglis, and Moses Marks, Appellees. Transcript of Record. Appeal from the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

Filed October 25, 1897.

F. D. MONCKTON,

Clerk.

No. 407.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BERNARD McGORRAY,
Appellant,

vs.

MYLES P. O'CONNOR, ET AL.,
Appellees.

APPELLANT'S BRIEF.

AMOS H. CARPENTER,
Solicitor for Appellant.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

BERNARD McGORRAY,
Appellant,
vs.
MYLES P. O'CONNOR, ET AL.,
Appellees.

STATEMENT OF THE CASE.

This is an action in equity, and was brought to redeem certain real property from a mortgage sale. C. W. Carpenter and C. K. Bailey were partners in farming and stock raising, and gave a mortgage of $10,000 to defendant O'Connor on a portion of their real estate. Afterward Carpenter died and left an alleged will, under the terms of which a large portion of his property was devised to the children of said C. K. Bailey, which said will was twice adjudged to be null and void by the Superior Court of San Joaquin county, California, by reason of the unsoundness of mind of the testator, and of fraud and undue influence exercised by the defendant, C. K. Bailey; but a new trial having been granted, the case was still pending in said court at the time of the commencement of this action. C. K. Bailey, the surviving partner, caused said mortgage to be fore-

closed for the purpose of defrauding the Carpenter heirs, and the land covered thereby was purchased at such sale by the defendant O'Connor, the mortgagee, for the amount of the note and costs, which was about one-third of its real value, with the understanding that it should be reconveyed to the said Bailey for the amount of the purchase price after Carpenter's heirs' time of redemption had expired.

Clinton H. Carpenter was an heir at law of C. W. Carpenter, and his successor in interest in respect to the land in controversy, and one of the contestants of said alleged will, and the defendant against whom a judgment was duly rendered and docketed in said Superior Court, so that it became a lien on said real property after said mortgage had been foreclosed. The complainant, who was the owner of this judgment against Clinton, tendered within the time allowed by law, to defendant Cunningham, the Sheriff who made the sale, the money necessary to redeem said property, which, at the instigation of defendants O'Connor and Bailey, and in collusion with them for the purpose of defrauding said heirs, he refused to receive. This action was then brought, and the defendants filed answers which were not accompanied by a certificate of counsel that they were well founded in point of law, as required by Rule 10 of the Rules of Practice of the United States Circuit Court. The complainant then moved to

strike said answer off the files on that ground, and also to strike out portions of said answers on the ground that such parts were sham, irrelevant, impertinent and conclusions of law, and also moved the Court for judgment on the pleadings.

On the 3d day of August, 1896, the Court denied complainant's motion to strike said answers off the files, and gave the defendants permission to amend their said answers by adding such certificate, and took said other motions of complainant under advisement.

On the 13th day of July, 1896, while complainant's motions were pending as aforesaid, the defendants moved the Court to set said cause for hearing on bill and answers, and the same was denied on the 3d day of August, 1896.

The defendants having failed and refused to amend their answers in accordance with the permission of the Court as aforesaid, the complainant again moved the Court on notice to strike said answers off the files, and for judgment for want of an answer, and the same was denied on the 31st day of March, 1897.

While all of complainant's motions were pending and submitted to the Court for decision as aforesaid, the defendants, without leave of Court, renewed their previous motion to set said cause for hearing on bill and answers, and the same was granted and a decree

was thereupon entered in favor of defendants. The complainant appealed.

SPECIFICATION OF ERRORS.

1.—It was error to deny complainant's second motion to strike the defendants' answers from off the files and allow a default, when said defendants had refused for several months to make such answers conform to the requirements of the rules of Court.

2.—It was error to deny complainant's motion to strike out the said several portions from the defendants' answers, the same being sham, irrelevant, impertinent and conclusions of law.

3.—It was error to entertain and grant defendants' second motion to set said action for hearing on bill and answers when once denied and renewed, without leave of Court, under the same circumstances as existed when first made.

4.—It was error to set said action down for hearing on bill and answers before the exceptions to such answers and the issues raised thereby were settled.

5.—It was error to set said action down for hearing on bill and answers without allowing the complainant three months, or a reasonable time after the disposal of

the exceptions to said answers and the settlement of the issues raised thereby, in which to take testimony in support of his bill.

6.—It was error to hold that complainant's said several motions were not made at the proper stage of the proceedings, and that they were made too late.

7.—It was error to deny complainant's motion for judgment on the pleadings.

8.—It was error to hold that all, or any part or portion, of the said several answers objected to by the complainant as sham, impertinent, irrelevant and conclusions of law, were proper or material allegations, because responsive to the bill of complaint.

9.—It was error to hold that the Sheriff, as an executive officer having no interest in the matter in controversy, had a right to deny the allegations of the bill, and thereby contest the complainant's right to redeem.

10.—It was error to hold that defendant O'Connor, the mortgagee, having no interest in the matter in controversy, save the amount invested in the mortgage note, had a right to deny the allegations of the bill, and thereby contest the complainant's right to redeem.

11.—It was error to hold that defendant O'Connor, the mortgagee, having made Clinton H. Carpenter a

party defendant to his action foreclosing the mortgage, and a defendant in execution therein, was not estopped from denying said Clinton and his creditors' right to redeem.

12.—It was error to hold that the title to C. W. Carpenter's interest in the real property of the firm of Bailey & Carpenter did not vest in Clinton H. Carpenter, one of his heirs at law, at the time of his death.

13.—It was error to hold that the title to C. W. Carpenter's interest in the real property of the firm of Bailey & Carpenter vested in C. K. Bailey, the surviving partner, and not in said Carpenter's heirs at law.

14. It was error to hold that Clinton H. Carpenter, as an heir at law of C. W. Carpenter, deceased, or his creditor had no interest in the mortgaged property of his late brother, and no right to redeem the same from the mortgage sale, because said estate had not been distributed to him as such heir.

15.—It was error to hold that Clinton H. Carpenter, as a defendant in the action of foreclosure, and a defendant in execution therein, or his creditor, had no right to redeem the mortgaged property.

16.—It was error to hold that a person, having either a vested or a contingent interest, however slight, in

mortgaged property, can not redeem it from a mortgage sale, if the mortgagee, or Sheriff making the sale thereof, objects to such redemption.

17.—It was error to render a decree in behalf of defendants on bill and answers, because all matters and allegations in said answers that were not responsive to the bill, or that were made on information or belief, or that were not positive, or that were allegations or denials of conclusions of law, could not be taken, treated or considered as evidence on such hearing.

18.—It was error to render a decree for the defendants upon bill and answer, after excluding from consideration those portions of said answers that were conclusions of law, irresponsive and not positive allegations and denials, and those allegations made on information or belief and leaving the material allegations of the bill and the charges of collusion and conspiracy therein contained undenied.

19.—It was error to refuse to allow the complainant to redeem, when such redemption could not injure the defendants, and a refusal thereof might jeopardize the complainant's judgment and Clinton's entire interest in his brother's estate.

ARGUMENT.

1.—Rule No. 10 of the Rules of Practice of the United States Circuit Court provides that "no demurrer, or "special plea, or answer to a complaint shall be allowed "to be filed, unless accompanied by a certificate of "counsel, that, in his opinion, it is well founded in point "of law." As the answers did not conform to the above rule, the complainant, on the 16th day of July' 1896, moved the Court to strike said answers from off the files and for a default. On the 3d day of August, 1896, the motion was denied, and leave was given said defendants to add such certificate. (Trans. pg. 83.) The defendants having refused to add said certificate, the complainant, on the 25th day of March, 1897, made affidavit of such refusal on the part of the defendants, and renewed, on notice, his motion to strike said answers from off the files and for a default. This motion was denied on the 31st day of March, 1897, and complainant excepted thereto. (Trans. 86) The rule is imperative that no answer shall be filed without such certificate, but, having been filed contrary to said rule, they should have been disregarded until corrected, in accordance with the permission granted by the Court. Such has been the penalty attached to the breach of similar rules.

Nat'l Bank vs. Ins. Co., 104 U. S., 54-76.

Hinds vs. Keith, 13 U. S. App., 314.
Secor vs. Singleton, 9 Fed. Rep., 809.

The defendants having refused to make their answers conform to the requirements of said rule, they should have been stricken from the files, a default should have been entered, and the complainant's bill taken *pro confesso*.

2.—The errors assigned under this paragraph can be ascertained only by an inspection of the original papers —except the denial of complainant's citizenship. (Trans. 29.) Such an objection cannot be raised at a trial on the merits. Defendants should have filed a plea in abatement.

Hartog vs. Memory, 116 U. S., 589.
Farmington vs. Pillsbury, 114 U. S., 143.
DeWolf vs. Raband, 1 Pet., 476.

3.—On the 13th day of July, 1896, the defendants moved the Court to set the action down for hearing on bill and answers, and on the 3d day of August, 1896, said motion was denied by Judge McKenna on the ground that the issues were unsettled. (Trans. 93.)

On the 17th day of March, 1897, the defendants, without leave of Court, renewed said motion under precisely the same circumstances as existed when the motion was first made. (Trans. 94.) And on the 12th

day of April, 1897, Judge Morrow granted said motion, and refused to allow the complainant any time in which to take testimony in support of his bill. (Trans. 100.)

It is a well settled principle of law and practice in this State, that a motion renewed without leave of Court should be denied.

Reed vs. Allison, et al., 54 Cal., 490.
Ford vs. Doyle, 44 Cal., 637.

In the Federal Courts it has been held that a Judge will rarely refuse to follow a ruling made by one of his colleagues in the same or a similar case.

Cole S. M. Co. vs. Va. and G. H. Water Co., 1 Saw., 685.

Waklee vs. Davis, 44 Fed. Rep., 532.

Warswick Mf'g Co. vs. City of Phila., 30 Fed. R., 625.

4.—On the 31st day of March, 1897, while the pleadings were unsettled and the issues undetermined by reason of complainant's motions to strike our portions from the answers of the defendants, to strike said answers off the files, and for judgment on the pleadings, the defendants moved the Court to set said action for hearing on bill and answers. (Trans. 95). All four of said motions were submitted at the same time. Subsequently the Court denied all of complainant's motions,

and ordered a decree for the defendants before the complainant had notice that the issues were settled. This was equivalent to deciding the case before the issues were determined.

5.—The complainant should have been allowed a reasonable time, or at least three months from the settlement of said issues, in which to take testimony in support of his bill.

Equity Rules, No. 69.

6.—The law and the rules of practice in Courts of Equity, prescribe no time within which such motions may be made. The defendants can not complain because the complainant waited a reasonable time for them to make their answers conform to the requirements of the rules of court. before renewing his motion to strike them off the files for want of a proper certificate of counsel.

If said motions of complainant were not made in time, the defendants should have moved to strike the same from the files on that ground. By consenting to a continuance from time to time and setting them down for hearing on the merits, the objection was waived.

Foster's Fed. Practice, Vol. I, sections 152, 153, 139, 119.

Daniel's Ch. Practice (2 Am. ed.), 661-663.

Ewing vs. Blight, 3 Wall, Jr., 134.
Curzon vs. De La Zouch, 1 Swanst, 193.

It is contended by defendants that a motion to strike out is a proceedure unknown to the Federal practice. The authorities do not support this assertion.

Armstrong vs. Chem. Nat'l Bank, 37 Fed. Rep., 466.
U. S. vs. Stone, 106 U. S., 525.
Gilchrist vs. Helena etc. Ry. Co., 47 Fed. Rep., 593.

A demurrer or exceptions can not reach redundant, sham or irrelevant matter; it can only be expunged on motion.

Adams vs. Bridge Iron Co., 6 Fed. Rep., 179.
B. B. R. Iron Co. vs. W. R. Iron Co., 43 Fed. Rep., 391.

7.—Judgment should have been rendered in favor of the complainant on the pleadings. It is alleged in the bill that only a portion of the estate of Carpenter was devised to Bailey's children, and that Clinton H. Carpenter was one of the heirs and successors in interest of his late brother in respect to the land in controversy. (Trans. pg. 6.) These allegations are admitted by the defendants. Therefore, the title to

said land vested in Clinton at his brother's death. This, together with the other admissions of the defendants, and the allegations of the bill is a solution of the whole case, and renders a consideration of the technical objections of the defendants' unnecessary.

8.—All of the sham, irrelevant, impertinent and redundant matter and conclusions of law pleaded in said answers should have been stricken out on motion. The denial of a conclusion of law raises no issue, and the facts are deemed admitted.

Nelson vs. Murray, 23 Cal. 338.

Turner vs. White, 73 Cal., 299.

Adams vs. Adams, 21 Wall., 185.

U. M. Ins. Co. vs. C. M. M. Ins. Co., 2 Curt., 524.

Sham, impertinent and redundant matter should be expunged on motion, although responsive to allegations in the bill.

9.—Defendant Cunningham was an executive officer and the Sheriff who made the sale of the property. As such officer he had no interest in the matter of the redemption. He can not contest or litigate, legally or equitably, either as plaintiff or defendant, a matter in which he has no interest. This is a too well settled principle of law to need the citation of authorities.

10.—Defendant O'Connor was the mortgagee, and his interest in the matter of the redemption was a lien on the property for the amount invested in his mortgage note.

Curtis vs. Millard. 81 Am. Dec., 460.
Reynolds vs. Harris, 14 Cal., 667.
McMillan vs. Richards, 9 Cal., 365.
Crassen vs. White, 87 Am. Dec., 420.

Having been tendered the full amount of that lien by one of the defendants in his action of foreclosure, he had no right, legal or equitable, to contest such redemption.

Jones vs. Black, 48 Ala., 540.
Dejornette vs. Haynes, 23 Miss., 600.

And a Court will not allow a mortgagee to urge, by way of defense, that the right of redemption impairs the obligation of a contract.

Sullivan vs. Berry, 4 Am. S. Rep., 147.
Williamson vs. Carlton, 51 Me., 449.

Or that a second mortgage under which a redemptioner offered to redeem was fraudulent.

Baldwin vs. Burt, 61 N. W., 601.
Hovey vs. Tucker, 50 N. W., 1038.

Or that there was other fraud on the part of the redemptioner.

Bradley vs. Snyder, 14 Ill., 263.

Livingston vs. Ives, 35 Minn., 55.

Or that the complainant is not the owner of the right of the redemption.

Jones on Mortgages, Vol. II, section 1105.

Or that some person other than the redemptioner furnished the money.

Seale vs. Doane, 17 Cal., 477.

Or that there was no consideration between the assignee and assignor for the right of redemption, or the former's object in obtaining it.

Jones on Mortgages, Vol. II, section 1105.

Or that the claim under which the redemption was made was irregular.

Schuck vs. Gerlach, 101 Ill., 342.

Powers vs. Russell, 13 Pick., 69.

Or that the mortgagor has not a valid title to the mortgaged premises.

Lorenzano vs. Camarillo, 45 Cal., 128.

Powell on Mortgages, Vol. I, 408.

As long as the lien of the mortgage was recognized and secured, it was no business of the mortgagee who held the right of redemption or what became of it.

Bradley vs. Snyder, 58 Am. Dec., 565.

If the Sheriff receives the money from one not entitled to redeem, that does not prejudice the party holding the certificate of sale.

Horton vs. Maffitt, 100 Am. Dec., 222.

11.—When the defendant O'Connor foreclosed his mortgage upon the property in controversy, he made Clinton H. Carpenter a party defendant therein, and alleged that he was an heir at law of his deceased brother, and thereby had an interest in said realty. (Trans. 6.) In his answer herein he alleges that he made Clinton a party to cut off this right of redemption. (Trans. 40.) These allegations are clearly an admission that the right exists and should estop him from denying his and his creditor's right to redeem.

12.—All questions as to the vesting of the property in controversy in the heirs at law, or the validity or invalidity of the alleged will of C. W. Carpenter, is really eliminated from consideration in this case, as is shown in paragraph No. 7 herein; but for the purpose of showing the fallacy of the claim that, in case of a voidable will, the title to real property vests in the legatees, it may be said that if that theory be correct, the realty included in C. W. Carpenter's will vested first in the legatees, then in the heirs at law at the termination of the first contest, and, depending upon the status of the will, changed from one to the other four times. If, after

the next trial, it should finally be adjudged void, the realty would, on the fifth change, vest in those naturally entitled. Such a theory is absurd.

Real property vests in the heirs at law until it has been finally adjudicated that it belongs to others not naturally entitled.

Legatees' rights are contingent, and depend upon the final establishment of the will.

If the will is not probated and finally declared valid, the legatees take nothing thereunder. Hence, no real property vests in them until their rights are finally determined.

It has been held in this State that where a will is void or voidable, as to persons naturally entitled to inherit the property, the realty vests immediately after the testator's death in the heirs at law *notwithstanding the will.*

Smith vs. Olmstead, 88 Cal., 582.
Estate of Wardell, 57 Cal., 489.
Pearson vs. Pearson, 46 Cal., 627.

13.—All the interest of a deceased partner in partnership real property vests in the heirs at law, and not in the surviving partner.

Redfield on Wills, Vol. III, pg. 143.
Washburn on Real Property, Vol. I, pgs. 702-4.

Bates on Partnership, sections 293 and 712.
Freeman on Executions, Vol. I, section 183.
Parson on Contracts, Vol. I, pg. 169; note.

The surviving partner has merely an equity in such property for the payment of the partnership debts.

McNeil vs. Cong'l Soc., 66 Cal., 106-110.
Stokes vs. Stevens, 40 Cal., 394.
Lowe vs. Alexander, 15 Cal., 298.

14.—Upon the death of the owner, all his real property vests immediately in the heirs at law, and does not await the decree of distribution. This is a primary principle of law, and does not require the citation of authorities.

15.—It is admitted by the defendants that Clinton H. Carpenter was a party defendant in the action foreclosing the mortgage and that he was made a defendant therein for the purpose of cutting off his right of redemption in said real property. The judgment divested Clinton of his property, and it is immaterial whether it was land or money. The judgment and execution having run against his interest in the land, it gave him and his creditor the right to redeem it.

Yoakum vs. Bower, 51 Cal., 540.
Whitney vs. Higgins, 10 Cal., 554.
Hall vs. Arnott, 80 Cal., 355.

And he has a right to redeem, although he has no interest in the mortgaged property.

Lorenzano vs. Camarillo, 45 Cal., 125.

Yoakum vs. Bower, *supra.*

This is decisive of the whole case, and is sufficient alone to entitle the complainant to redeem.

A judgment creditor may redeem.

C. C. P., section 701.

Kent vs. Laffan, 2 Cal., 596.

McMillan vs. Richards, 9 Cal., 366.

Brainard vs. Cooper, 10 N. Y., 361.

Schuck vs. Gerlach, 101 Ill., 338.

And the judgment need not be a lien upon the real property.

Schroeder vs. Bauer, 41 Ill. App., 484.

Plase vs. Ritch, 132 Ill., 638.

Karnes vs. Lloyd, 52 Ill., 113.

16.—A contingent interest is sufficient to entitle one to redeem.

Bacon vs. Bowdon, 22 Pick., 401.

Davis vs. Wetherell, 13 Allen, 63.

Jones on Mortgages, section 1065.

Under the referee's award, Clinton's and his brother's interest in the estate was adjudged to be $11,256. This, aside from his other interests, gave him a vested

interest in the estate, and entitled him to redeem.

Smith vs. Austin, 9 Mich., 474.
Frisbee vs. Frisbee, 86 Me., 444.
Spenc's Eq. Juris, Vol. II, pg. 660.
Story Eq. Juris, Vol. II, section 1023.
Pingrey on Mortgages, Vol. II, section 215.
Bell vs. Mayor of N. Y., 10 Paige Ch., 56.

"The right of redemption exists, not only in the "mortgagor himself, but in his heirs and personal "representatives, and assignees, and in every other "person who has an interest in, or a legal or equitable "lien upon, the lands, * * and doubts as to the "*extent* of the right to redeem beyond the mortgagor "and his representatives, arise only in the courts of "*limited* and not of general equity jurisdiction."

Kent's Com., Vol. IV, 162; cases cited.
Lewis vs. Nagle, 2 Ves. Sr., 431.
Boone on Mortgages, section 160.
Pardee vs. Van Anken, 3 Barb., 537.
Gatewood vs. Gatewood, 75 Va., 407.
Butts vs. Broughton, 72 Ala., 298.
Wash. on Real Prop., 553.
Boquet vs. Coburn, 27 Barb., 230.
Gower vs. Winchester, 33 Ia., 305.

17.—When a cause is heard on bill and answer, allegations in the answer that are not responsive to

matters in the bill, are not evidence.

Sargent vs. Larned, 2 Curt., 340.
Seitz vs. Mitchell, 94 U. S., 580.
Atty. Gen'l vs. Steward, 21 N. J., Eq. 340.

Nor are denials on information or belief.

Berry vs. Sawyer, 19 Fed. Rep., 286.
Allen vs. O'Donald, 28 Fed. Rep., 17.

Nor are allegations or denials of conclusions of law.

Adams vs. Adams, 21 Wall., 185.
Union M. Ins. Co. vs. Com. M. M. Ins. Co., 2 Curt., 524.

18.—Applying the law laid down in the foregoing paragraph to the answer of the defendant Cunningham, the following denials and allegations could not be considered as evidence on such a hearing, namely:

That complainant was a citizen of Illinois (pg. 47); That the pretended will was the last will and testament of C. W. Carpenter (pg. 48); That the claims of all persons interested in said estate were presented to the referee (pg. 51); That some of said parties were minors (pg. 51); That the heirs of C. W. Carpenter were entitled to the realty in controversy (pg. 52); That Clinton had a right to redeem (pg. 54); That complainant's judgment became a lien (pg. 54); That the value of the real property was $34,770 (pg. 56);

That C. K. Bailey is wrongfully carrying on said partnership business (pg. 56).

And also the following from the answer of the defendant O'Connor, namely: That complainant was a citizen of Illinois (pg. 29); That the form of the agreement of reference was as specified (pg. 31); That said real property constituted a part of the assets of the estate of Carpenter (pg. 40); That said heirs were not proper parties to said suit of foreclosure (pg. 40); That no personal judgment was taken except against C. K. Bailey (pg. 41); That complainant's judgment was a lien (pg. 42); That said judgment was assigned to complainant (pg. 42); That complainant never had a lien (pg. 43); That no redemption had ever been made (pg. 43); That C. K. Bailey had nearly wrecked said estate (pg. 43); That said realty was sold for the purpose of defrauding the heirs and said redemption prevented by the collusive acts of the defendants (pg. 44); That C. K. Bailey now claims an interest in said property (pg. 44).

Excluding all the allegations of which the foregoing are a brief syllabi, it leaves nearly all the allegations in the bill of complaint undisputed, and, among others, the following, namely:

That Clinton H. Carpenter succeeded to the interest of his late brother in respect to the land in controversy;

That complainant's judgment was a lien upon that interest; That he took the necessary steps to redeem the land, and was prevented from so doing by the defendants, who were in collusion with the defendant Bailey to defraud the heirs of C. W. Carpenter of that portion of their inheritance.

Such a showing in a Court of Equity, in connection with the other allegations in the bill, ought to entitle the complainant to the relief prayed for, when the granting of the same could work no injury to the defendants, and the refusal thereof might deprive the heirs of their entire inheritance.

19.—The right of heirs at law to redeem is recognized by all courts, otherwise they might lose their entire interest in their ancestor's estate.

Moore vs. Beasom, 44 N. H., 218.
Stark vs. Brown, 78 Am. Dec., 762.
Story Eq. Juris, section 1023.
Pow. Eq. Juris, Vol. III, section 1220.
Teedeman on Real Prop., section 334.
Freeman on Executions, section 317.
Scott vs Henry, 13 Ark., 122.

If the heirs at law are disinherited and they contest the will, they have the right to redeem.

Jones on Mortgages, sections 1062, 1418.
Davis vs. Witherell, 13 Allen, 63.

In a case similar to the one at bar the Supreme Court of Alabama said:

"Although the instrument propounded as the will "of Samuel Acre purported to give the mortgaged "premises to his widow, and although it was in the "first instance admitted to probate as his will; yet "for five years thereafter the right by statute existed "in his heirs to contest its validity by bill in chancery. "The existence of this right and its actual assertion "by their bill, made them proper parties to Hunt's "suit for foreclosure. * * * His election to proceed "without them to a decree and to a purchase under "that decree was made at his own peril and can not "be allowed to operate so as to impair their right to "redeem."

Hunt, et al. vs. Acre, et al., 28 Ala., 596.

If the mortgagee receives the amount of his mortgage note, he can not be injured by the redemption. If the complainant's right is denied he loses his judgment and the heirs lose all their right in that portion of their deceased brother's estate.

In this State there are two distinct methods of redeeming real property from a mortgage sale, and two separate rights of redemption are provided by the codes and recognized by the courts. One is the statutory right.

Code of Civil Procedure, sections 701-707

And the other is the equitable right.

Civil Code, section 2903.
Hall vs. Arnott, 70 Cal., 348.
Tuol. Redem. Co. vs. Sedgwick, 15 Cal., 527.
Whitney vs. Higgins, 10 Cal., 547.
Montgomery vs. Tutt, 11 Cal., 307.
Eldredge vs. Wright, 55 Cal., 531.

The complainant complied with all the provisions laid down under the statutory right, and was denied the privilege. He then instituted this action in equity to enforce the right. Section 2903 of the C. C. provides that "every person, having an interest in property subject to a lien, has a right to redeem it from that lien."

As to the interpretation of this legal and equitable right, the Supreme Court of this State has said:

"There is no good reason why the statute, which is "remedial in its character, should receive a narrow con- "struction in order to defeat the right of redemption " which it intended to give."

Yoakum vs. Bower, 51 Cal., 540.
Schuck vs. Gerlach, 101 Ill., 338.

"A court of equity will assist all persons claiming "in equity of redemption, unless their title is directly "against conscience."

Powell on Mortgages, pgs. 334, 261.

"The Court looks with jealousy on all attempts to "impair or embarass the exercise of the right of re-"demption."

Willard's Eq. Juris, 448.

"The right of redemption is a favorite equity."

Chicago D. & V. Ry. Co. vs. Fosdick, 106 U. S., 47.

There is no equity in the defendants' claims, and the same should be disregarded in order that justice may be done in the matter.

Walkerly vs. Bacon, 85 Cal., 141.
Johnston vs. S. F. Savings Union, 75 Cal., 134.
Weyant vs. Murphy, 78 Cal., 283.

The complainant having tendered a sufficient sum to redeem, the Sheriff had no power to execute a conveyance to the defendant.

Hershey vs. Dennis, 53 Cal., 80.

We submit that the judgment herein should be re-reversed, and that this Honorable Court direct the entry of a decree in the lower court in favor of complainant, which will finally dispose of all matters in con-

troversy herein as by law provided in cases in equity.

Blease vs. Garlington, 92 U. S., 1.

Penhallow vs. Doane, 3 Dalles, 54.

Wickliff vs. Owings, 17 How., 47.

Respectfully submitted,

AMOS H. CARPENTER,

Solicitor for Appellant.

No. 407.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BERNARD McGORRAY,
Appellant.

vs.

MYLES P. O'CONNOR et al.,
Appellees.

Brief for Appellees.

OLNEY & OLNEY,
DUDLEY & BUCK,
Solicitor for Appellees.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

BERNARD McGORRAY, *Appellant,* vs. MYLES P. O'CONNOR ET AL., *Appellees.*	No. 407.

BRIEF FOR APPELLEES.

Bernard McGorray, claiming to be a citizen of the State of Illinois, filed in the Circuit Court of the Northern District of California, a bill in equity against M. P. O'Connor and the other respondents, wherein he claimed that a certain sheriff's deed which O'Connor had received from the defendant Cunningham was void, and prayed that it be ordered cancelled, and that plaintiff be allowed to redeem the premises conveyed by the deed. The respondents interposed demurrers which were overruled. Defendant O'Connor thereupon filed his separate answer, and the other defendants united in a joint answer.

O'Connor's answer was filed March 26, 1896 (p. 46). The answer of the other defendants was filed March 30, 1896 (p. 63).

Thereupon the complainant filed his replication to both these answers. This replication was filed April 1, 1896 (pp. 63, 64, 66). The bill of complaint did not waive an answer under oath (p. 13–77). The case being at issue the complainant had three months under rule 69 for taking his testimony, and this time expired July 1, 1896. If a so-called bill of exceptions is left out of consideration, it appears from the record that the next thing done was that all parties submitted the cause on bill and answer to the court for decision, and that on April 12, 1897, the court adjudged that the plaintiff was entitled to no relief, and his bill of complaint dismissed. (See pp. 66, 67, 68.)

The appellant (plaintiff in the court below) has attempted an innovation in equity practice by presenting to the judge and getting him to settle a bill of exceptions.

We presume that this is the first instance known of a bill of exceptions in equity practice.

On appeal to this Court from the Circuit Court in an equity case, the practice is, as it has been from time immemorial in this country and England, that the entire record goes up. A bill of exceptions is only known in actions at law. The Supreme Court of the United States has gone so far as to say that, where a jury has been called in to try issues in an equity case, "a bill of excep- " tions, as such, has no proper place in the proceeding," but the original records must be used by the Court in deciding whether a new trial shall be granted.

Watt v. *Starke*, 101 U. S. 247;

Beach's Modern Equity Practice, Secs. 667, 671.

Therefore this Court has not before it any record which it can consider showing that motions were made to strike out portions of the answer, and the action of the Circuit Judge thereon.

But it matters little whether a bill of exceptions is permissible or not. We do not object to the Court considering any document in the transcript, even though it only appears because copied in a bill of exceptions. We do object, however, to this Court considering statements purporting to be contained in the so-called bill of exceptions, such as is found at page 92, latter part of 93, latter part of 94, pages 99, 100. We repeat that we do not object to this Court considering the documents constituting the record, but we do seriously object to what purports to be statements of fact contained in the bill of exceptions.

From these documents, and also from Judge Morrow's opinion (p. 77), it appears that two days before the complainant's time to take testimony had expired, and long after the issues were settled by his filing a replication to the answers of the defendants, he made a motion to strike out parts of the answers. What portions of the answers the complainant objected to cannot be made out from the record.

Judge Morrow in his opinion refers to this motion and says (p. 77):

" This motion has since been considered and denied, " not only because it had not been made at the proper " stage of the proceedings, but for the reason that the " allegations proposed to be struck out were responsive to " the allegations of the bill."

The order of the court denying the motion is at page 90.

There was also a motion made to strike the answers from the files, because not containing the certificate of counsel required when a special plea or answer is interposed.

That motion was evidently made because counsel did not distinguish between an answer to the merits and a plea or special answer.

We now take up the facts as they appear from the pleadings.

On the 30th of October, 1882, C. K. Bailey and C. W. Carpenter were general partners in farming and stock raising in San Joaquin County, California, under the name of Bailey & Carpenter (pp. 29, 39, 2).

A part of the partnership assets was a tract of land known as the "Bailey & Carpenter Home Place" (pp. 5, 6, 39, 40), and on said date the said "*firm*" gave a mortgage to M. P. O'Connor on said Home Place to secure the payment of $10,000 (pp. 5, 6, 39, 40).

After the execution of this mortgage by the partnership, C. W. Carpenter died. His death was June 22, 1884. He left a will, by which he gave the bulk of his estate to the children of his surviving partner, and appointed said surviving partner, C. K. Bailey, his executor. This will was admitted to probate February 23, 1884 (pp. 2, 29) and Letters Testamentary issued to Bailey. The heirs at law of the deceased partner were his brothers, and among them one Clinton H. Carpenter (pp. 3, 30).

Within one year after the will was admitted to probate these brothers instituted a contest of the will. There

were two trials of the issues over the will, both resulting in a verdict for contestants, but both verdicts were set aside by the Supreme Court of the State, and the contest is still pending, Bailey, of course, continuing to act as executor. On the 24th of May, 1893 (the bill of complaint is in error as to date), an agreement was made between the proponents of the will and the contestants to submit their differences to arbitration. This agreement is set out in full in the answer, commencing with page 31. This agreement was entered in the proceedings in Court in the matter of the estate. It provided that the arbitrator should fix and determine "what, under the "circumstances of the case, is a reasonable, just and "equitable amount or portion of the said estate to be "set over to such contestants in full of all claims of "each and every of them" (p. 32). It further provided that the referee should fix the values of the land, and that the proponent should have five days to decide whether to pay the sums fixed by the referee as the contestants' interest in the estate, or to convey lands at the value fixed by the referee. *But it was specially provided that no portion of the land covered by the mortgage to O'Connor (the Home Place) should be conveyed to the contestants.* Under the agreement, the matter was submitted to the arbitrator, and he filed in Court his award. It commences with page 37. The arbitrator found the net value of the estate to be $22,513.50, and fixed the value of contestant's interest to be $11.256.75, or one-half. He also appraised certain parcels of land in order that the lands might be conveyed to contestants, if the proponent so elected to do. But, as a matter of

course under the agreement, he left the property in controversy here, viz. the Home Place, to go, not to the contestants, but to the proponents of the will.

This award is still in full force and effect (pp. 5, 39). By it the said Clinton H. Carpenter, the contestant, and under whom plaintiff claims, lost all interest, if he ever had any, in the Home Place. That he never had any such interest as gives him the right of redemption, fully appears from Judge Morrow's decision.

It is alleged in the complaint and admitted by the answer, that the estate of Carpenter has never been distributed nor separated from the assets of Bailey and Carpenter, but that Bailey still continues to carry on the partnership business (pp. 10, 43).

The denials of the answer are very sweeping that the property covered by the mortgage to O'Connor were ever any part of the estate of the deceased C. W. Carpenter (p. 40), but the defendants admit that said land was a portion of the partnership assets of the firm of Bailey & Carpenter.

Meanwhile, and before the arbitration agreement, O'Connor brought suit to foreclose his mortgage (p. 40). In this suit he made C. K. Bailey as an individual, also as executor, also as surviving partner of the firm of Bailey & Carpenter, defendant. He also made certain of the heirs and legatees of the deceased C. W. Carpenter parties defendant, and among others the said Clinton H. Carpenter; but he alleges (p. 40) that none of these parties are or were necessary or proper parties, and the only purpose of doing so was purely precautionary. He also alleges that the Superior Court of San Joaquin County

duly gave and made a judgment foreclosing said mortgage as against C. K. Bailey as an individual, against C. K. Bailey as executor of the will of C. W. Carpenter, and against C. K. Bailey as surviving partner of the firm of Bailey & Carpenter, and that no judgment was entered against Clinton H. Carpenter except to cut off any supposed right of redemption the last named person might have (p. 41).

He also alleges that no personal judgment whatever was taken against any one except the defendant Bailey (p. 41).

This judgment was rendered March 15, 1890 (pp. 6–40). Under this judgment the property was sold by the defendant, Cunningham, as sheriff, and M. P. O'Connor became the purchaser. There being no redemption, and likewise there being no offer to redeem by a qualified redemptioner within the statutory time, the defendant, Cunningham, as sheriff, executed to the defendant, O'Connor, a sheriff's deed.

After the sale, and before the execution of a sheriff's deed, Amos H. Carpenter obtained a judgment against his brother, Clinton H. Carpenter, for a large sum of money (p. 7), and it is pretended that this judgment was assigned to plaintiff (p. 7), but that is denied (pp. 42, 43). As no proof was offered to sustain the allegation of the Complaint, this fact absolutely essential to any recovery by plaintiff, is not only unproven, but the denials must be taken as true. This one thing ends the case right here. If Clinton H. Carpenter had a right to redeem, which we deny, it does not appear that his right has passed to plaintiff. We submit that no further discussion is necessary. (See denials and allegations at pp. 42 and 43.)

Claiming to be the assignee of a creditor of Clinton H. Carpenter, who was one of the heirs of the deceased C. W. Carpenter, the plaintiff claimed the right (purely a statutory right) to redeem from the sale. His right to redeem was denied, and he brings this suit. The denials contained in the answer of O'Connor at pages 43, 44, and 45, negative all ancillary matters tending to show a cause of action in plaintiff.

The answer of the other defendants is substantially the same as the answer of the defendant, O'Connor (pp. 47–62).

We respectfully submit that no further argument is necessary. The denials of the answer must be taken as true, and they show that plaintiff is not entitled to relief. Judge Morrow's opinion states the law as we understand it in California. We desire only to add that, under the system in vogue in this State, heirs and legatees are not necessary parties to foreclosure proceedings where the mortgagor has died. It is only his executor or administrator who should be made a party.

Bayley v. *Muehe*, 65 Cal. 345;
Monterey Co. v. *Cushing*, 83 Cal. 507;
Collins v. *Scott*, 100 Cal. at p. 452.

The last named case was like this, that heirs had been made parties and afterwards brought suit to redeem. The Court said: "Whether or not they were made parties "defendant in that action is of no moment."

In addition to the authorities from California cited by Judge Morrow to the effect the heirs of a deceased part-

ner have no specific interest in any specific portion of the partnership assets whether of personalty or realty, we cite

Babcock v. *Bates*, 95 Cal. at p. 487;
Smith v. *Walber*, 38 Cal. 388.

It nowhere appears in this case how the record title to the land in controversy stood. All that appears is that is was partnership property. Such being the case Bailey as surviving partner took the title to the property. He was, until his title was divested by foreclosure, the sole owner, with a duty upon his part to account to the estate (not the heirs) of his deceased partner for his actions in regard to such property.

No heir of a deceased partner can sue the surviving partner. There must first be an executor or administrator appointed, and he alone can call the surviving partner to account.

This question is fully settled in *Robertson* v. *Burrell*, 110 Cal. 568, cited by Judge Morrow.

If Mr. Bailey has been derelict in his duty, he may be reached by proper proceedings, but to claim that an heir has a lien of any kind upon any specific portion of the partnership assets is a manifest absurdity.

Besides, how can plaintiff avoid the arbitration agreement and the award of the arbitrator? He alleges this award is in full force and effect, and seems to base his claim to relief upon the ground that the award gives his alleged predecessor, Clinton H. Carpenter, an interest in the property of the estate. But this agreement and the award expressly except the tract of land in dispute from any claim on behalf of the heirs of the deceased partner. In effect it awards the tract of land to other parties. Is

there any answer to this proposition? Whatever interest Clinton H. Carpenter may have had in the deceased partner's interest in the partnership property has, by his own agreement, and the award under the agreement, become limited to certain portions of the property to the exclusion of the land in dispute.

It must not be lost sight of that C. H. Carpenter was cut off by the judgment of foreclosure from any right to redeem as heir of the deceased. (See p. 41.) What plaintiff claims is that he is a redemptioner under the statute, because his alleged predecessor, C. H. Carpenter, was a judgment debtor. That has been the basis of his contention. But the answer negatives the allegations of the complaint in that regard.

There has been confusion in the mind of complainant's counsel all the time as to the right of a party to redeem from a mortgage, and the right to redeem from a sheriff's sale. The last is a purely statutory right. The first is an equitable right enforced by courts of equity, and to cut it off, foreclosure is necessary. This equitable right of C. H. Carpenter, as heir of the deceased, was cut off by the judgment. (We deny that as heir he had any such right.) Now when plaintiff claims under the statute he must claim as a judgment debtor, or as the successor in interest of a judgment debtor.

There are so many manifest and conclusive answers to the plaintiff's contention, that we respectfully submit his appeal is entirely without merit.

Messsr. Dudley & Buck have asked up to represent their clients, and therefore we sign ourselves.

OLNEY & OLNEY,
Solicitors for Defendants.

No. 407.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

BERNARD McGORRAY,
Appellant,

vs.

MYLES P. O'CONNOR ET AL.,
Appellees.

Petition for Rehearing.

L. W. ELLIOTT,
AMOS H. CARPENTER,
Solicitors for Appellant.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

BERNARD McGORRAY,
Appellant,

vs.

MYLES P. O'CONNOR ET AL.,
Appellees.

PETITION FOR REHEARING.

The appellant herein respectfully requests that a rehearing may be granted in the above entitled action wherein the decision of the lower Court was affirmed for the following reasons, namely:

1. That it was not error to refuse to allow the complainant to take evidence in support of his bill, as ninety days had elapsed from the time of filing the replication, although the issues were not settled until twelve days before the entry of the decree.

2. That it was not error to consider as evidence upon hearing on bill and answer the denial of the assignment of said judgment made by the defendant O'Connor on information and belief.

3. That it was not error to hold that the title to the

partnership real property of C. W. Carpenter, deceased, did not vest in Clinton H. Carpenter, one of his heirs at law at the time of his death, but in the surviving partner.

The complainant asks for such rehearing on the following grounds, namely:

1. That the issues were not settled within the meaning of Rule 69 until complainant's two motions to strike out portions of the answers, pending on the merits, were finally disposed of. If those motions were granted no evidence was necessary to substantiate the plaintiff's case. Neither party could tell what the issues would be until those motions were passed upon. This was done upon the 31st day of March, 1897, and complainant's time for taking testimony should have been reckoned from that date, but the decree was entered against him twelve days later upon hearing on bill and answer. This was error. If the motions were not made in time, the defendants should have moved to strike them from the files, but by consenting to a continuance and setting them down for hearing on the merits, the objection was waived.

Foster's Federal Practice, Vol. 1, sections 152, 119, 139.

But this ground is not necessarily material in deciding upon the merits of appellant's appeal.

2. The denial by O'Connor of the assignment of the

judgment to complainant was made on information and belief, and for that reason it could not be considered as evidence on such a hearing.

Berry vs. Sawyer, 19 Fed. Rep., 286.
Allen vs. O'Donald, 28 Fed. Rep., 17.

But all the other defendants admit the fact of the assignment, and as the Sheriff was the agent of O'Connor for the purpose of receiving the money and a copy of such assignment (C. C. P., section 705), the admission would bind him. He cannot be heard to dispute, on information and belief, what his agent admits in the line of his duty to be true. If either one of these propositions be true, the allegation of said assignment in the bill should not have been considered as denied.

But the defendants had no right to deny the fact of such assignment. It was no concern of O'Connor's who owned the judgment, provided his lien was recognized and secured.

Bradley vs. Snyder, 58 Am. Dec., 565.
Jones on Mortgages, Vol. II, section 1105.

On pages 8 and 9 of the bill, it is alleged that complainant produced and handed to the Sheriff a copy of "*the assignment of such judgment* to your orator, to-"gether with a copy of the docket of the judgment, " under which your orator claimed the right to redeem, " certified by the clerk of said court, *a copy of said*

"*assignment* from A. H. Carpenter, verified by your "orator's affidavit, showing the amount then actually "due on such judgment lien."

This was all the statute required him to plead, or prove, in relation to the assignment (C. C. P., 705), *and the same is not denied by any of the defendants.* It is expressly admitted by the Sheriff in his answer, on page 55 thereof.

The evidence of the assignment was surely sufficient upon hearing on bill and answer.

3. The title to C. W. Carpenter's interest in the partnership realty *vested in Clinton as one of his heirs at law*, and *not in the surviving partner.* This is a primary principle of law, and the doctrine laid down by the Supreme Court of this State in a recent case, where the learned justice said: "It is true that as heirs of their "father, the *title to his* (partnership) *property, real* or "personal, *vested* in them, but their *title* did not carry "with it the right of immediate enjoyment."

Robertson vs. Burrell, 110 Cal., 574.
Redfield vs. Wills, Vol. III, page 143.
Wash. on Real Prop., Vol. I, pages 702-4.
Bates on Partnership, sections 293, 712.
Freeman on Executions, Vol. I, section 183.
Parson on Contracts, Vol. I, page 169. Note.

These authorities settle the doctrine in this State, and show conclusively that complainant's judgment was a lien upon Clinton's title.

The cases cited by the defendants, and in the opinion of the Court, do not hold that the title to partnership realty vests in the surviving partner, but that he has an equity in such property for the payment of the partnership debts.

4. If our view of the *last two reasons*, upon which judgment of the lower Court was affirmed, be correct, the appellant, in our opinion, is entitled to a reversal of the decree. but we have the following additional reasons which appear to have escaped the attention of this Honorable Court in considering the case, namely:

I.

Judge McKenna refused to hear the case on bill and answer, because the issues were not settled (Transcript 93). Defendants afterward renewed the motion, without leave of Court, under precisely the same circumstances as existed at the time the first motion was made (Transcript 99, 94).

The first order became the law of the case, and should have been followed.

Reed vs. Allison, 54 Cal., 490.

Cole S M. Co. vs. Va., Etc., Co., 1 Saw., 685.

Waklee vs. Davis, 44 Fed. Rep., 532.

II.

It is alleged in the bill, and undenied in the answers, that only a portion of the estate of Carpenter was devised to Bailey's children; that Clinton was one of the heirs and successors of his late brother, in respect to the land in controversy (Transcript 6), and that said judgment was docketed against him. This alone should entitle the appellant to a decree.

III.

That the Sheriff was an executive officer, and had no interest in the matter of the redemption, and therefore could not contest or litigate, legally or equitably, either as plaintiff or defendant, the claim of complainant.

His answer should have been disregarded.

IV.

The same is true of defendant O'Connor. His interest was the amount of his mortgage note, and having been tendered that sum by a defendant in his action foreclosing the mortgage, he had no right to refuse it. (See Appellant's Brief, pages 14, 15.)

V.

Defendant O'Connor having made Clinton a party to his foreclosure suit, for the purpose of cutting off his right to the property and its redemption, is estopped from denying his and his creditor's right to redeem.

The fact that he was a defendant therein gave him the right to redeem, although he may have had no interest in the property.

Yoakum vs. Bower, 51 Cal., 540.
Lorenzano vs. Camarillo, 45 Cal., 125.

"*Parties to the suit* in which the judgment was "rendered, under which the sale is made," may redeem.

Whitney vs. Higgins, 10 Cal., 554.

VI.

If the Court should hold that the surviving partner, executor or administrator, as the representative of the deceased, was the only person that had the right to redeem the premises, it would be equivalent to holding that the heirs of Carpenter had no rights to their brother's property, which might not be cut off by the fraudulent acts of such representative, because it is alleged in the bill and denied on information and belief (which is not evidence on such a hearing), that such surviving partner, in collusion with the other defendants, was endeavoring to defraud said heirs by getting said

property for himself, and preventing such redemption.

If the heirs were bound by his acts, under such circumstances, it would be practically admitting that courts of equity were unable to afford relief in cases of fraud.

"Every person having an interest in property, subject to a lien, has a right to redeem it from that lien."

Civil Code, section 2903.

A contingent interest is sufficient.

Bacon vs. Bowden, 22 Pick, 401.

VII.

There is an *equitable* as well as a statutory right of redemption.

Whitney vs. Higgins, 10 Cal., 547.

Tuol. Redem. Co. vs. Sedgwick, 15 Cal., 527.

Hall vs. Arnott, 80 Cal., 348.

The appellant pursued the statutory course, and was denied the right. If this Honorable Court refuses a rehearing and affirms the judgment of the lower Court, he will be denied the eqitable right. Where a litigant's claim is equitable and just, as in this case, a court of equity should grant relief, when the granting of the same could work no injury to others. Collusive and fraudulent acts should not be sanctioned at any time, and especially when the perpetrators practically admit that a redemp-

tion by the appellant would not injure them. Their defense is purely a technical one, and ought not to be entertained in this Court. "The right of redemption is a favorite equity."

C. D. & V. Ry. Co. vs. Fosdick, 106 U. S., 47.
Powell on Mortgages, pages 334, 261.
Willard's Eq. Juris., 448.
Yoakum vs. Bower, 51 Cal., 540.

We submit that a rehearing should be granted, that the decree of the lower Court should be reversed, and that a final decree should be directed to be entered in the Court below, which will finally dispose of all matters herein, as by law provided in cases of equity.

Respectfully submitted,

BERNARD McGORRAY,
Appellant.

By L. W. ELLIOTT,
AMOS H. CARPENTER,
Solicitors for Appellant.

I hereby certify that the foregoing petition for rehearing is, in my judgment, well founded in point of law, and that it is not interposed for delay.

AMOS H. CARPENTER,
Counsel for Appellant.

No. 408.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JOHN H. WISE, as Collector of the Port of San Francisco, State of California,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, Importer of Certain Creosote, Merchandise, etc.,
Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

INDEX.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY, for Review of Decision of United States General Appraisers, Relative to Classification of Certain "Creosote" Merchandise Imported by said Southern Pacific Company.

Petition of the Southern Pacific Co. for a Review, etc.

To the Honorable, the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

The petition and application of the Southern Pacific Company respectfully shows:

That your petitioner is, and at the several times hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Kentucky.

That on or about the 19th day of March, A. D. 1895, the said Southern Pacific Company imported into the United States, to-wit, at the Port of San Francisco, in said State of California, from London, a port or place in the Kingdom of Great Britain, certain merchandise invoiced as 2,200 casks liquid creosote." Said merchandise is more fully described as the merchandise subject

to consumption entry number 3652, dated March 19, 1895, of the official serial numbers of said Customhouse, at said Port of San Francisco, and subject to decision number 27026 B-3893 of the official serial numbers of the Board of United States General Appraisers on duty at New York, State of New York.

That on the 5th day of April, A. D. 1895, upon the entry of the said merchandise, the Collector of said Port of San Francisco classified the said merchandise for duty as "Distilled Oil," dutiable at the rate of 25 per cent ad valorem, under the act of Congress of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue of the Government and for other purposes."

That thereafter, to-wit, on the 5th day of April, A. D. 1895, said entry was liquidated by said Collector, upon the classification and at the rate of duty hereinbefore set forth; and said duty upon said merchandise, amounting to the sum of $1,472, was ascertained, levied, and collected by said Collector, and the full amount thereof, together with all charges ascertained to be due upon said merchandise, was paid by said Southern Pacific Company on the 13th day of April, A. D. 1895.

That within ten days after such ascertainment, liquidation, and payment of said duties, to-wit, on the 13th day of April, A. D. 1895, the said Southern Pacific Company being dissatisfied with said classification, ascertainment, and liquidation, and the decision of the said Collector in the premises, gave notice to the said Collector in writing of such dissatisfaction, which written notice distinctly and specifically set forth the reasons for the objections of said importers thereto, as follows:

"That the article in question is not a distilled oil, but is, at ordinary temperature, a solid, waxy crystal, the chief contituents of which are naphthalene, tar acids and

pitch, and as such should be admitted free of duty under paragraph 443 of act of August 28, 1894, as product of coal tar specially provided for."

That thereafter, in due and proper time, said Collector transmitted all the papers and exhibits on which said entry was made, or connected therewith, to the Board of the United States General Appraisers, then on duty at the Port of New York, State of New York, United States of America; and thereafter, on the 27th day of July, 1896, said Board of United States General Appraisers, to-wit, H. M. Somerville, Charles H. Ham, and George C. Tichenor, made and rendered their decision in said matter in favor of the said classification, ascertainment, and decision made and rendered and duty levied and exacted as aforesaid, and against said protest.

And your petitioner avers that it is dissatisfied with the said assessment of said Collector, and is dissatisfied with said decision of said Board of General Appraisers as to the construction of the law respecting the classification of the said creosote and the duty imposed thereon.

Wherefore, your petitioner now applies to this Honorable Court for a review of the questions of law and fact involved in said decision of said Board of General Appraisers.

And in respect to said entry and the said payment, your petitioner specifies as the reasons for his objections thereto, as follows, to-wit:

That the said Collector erred in making said assessment, and said Board of General Appraisers erred in sustaining said assessment to the amount set forth in this petition with respect to said entry, and erred in finding as a fact that the merchandise in question was and is a distilled oil, and erred in finding that oils were and are its chief constituents, and erred in not finding that tar

acids, naphthalene, and pitch were and are the chief constituents of said merchandise, and erred in not finding that said merchandise was and is not an oil, and erred in concluding, holding, and deciding that the duty upon said merchandise was and is 25 per cent ad valorem, and in not concluding, holding, and deciding that there was and is no duty upon said merchandise, but that the same was and is free of duty.

And your petitioner further prays this Honorable Court for an order that the said Board of General Appraisers do return to this Court the record and evidence taken by them, together with a certified statement of the facts involved in said case, and their decision thereon, and that upon said record and evidence, and such further evidence as may be taken herein, the Court proceed to hear and determine the questions of law and fact involved in said decision, respecting the classification of said merchandise and the rate of duty imposed thereon under said classification, and that upon such determination, said decision of said Board of General Appraisers be reviewed, reversed, and set aside; that your petitioner may recover said sum of money as assessed against it, as hereinbefore stated, and its costs, and that this Honorable Court afford such other and further relief to petitioner as may be right and just in the premises.

[Corporate Seal] SOUTHERN PACIFIC COMPANY.
By CHAS. F. CROCKER,
Vice-President.

Attest:
E. C. WRIGHT,
Secretary.
FRED'K B. LAKE,
Attorney for Petitioner.

[Endorsed]: Served Aug. 26, 1897. E. B. Jerome. D. C. Filed August 26th, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY, for Review of Decision of United States General Appraisers, Relative to Classification of Certain "Creosote" Merchandise Imported by said Southern Pacific Company.	No. 12,247.

Order of Court for Return of Board.

Whereas, the Southern Pacific Company, a corporation organized and existing under the laws of the State of Kentucky, as importer, has applied to this Court for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers on duty at the Port of New York, in the State of New York, which said decision was made and rendered on the 27th day of July, 1896, in the matter of the protest 27026 B|3893, classifying said merchandise for duty as "distilled oil," dutiable at the rate of 25 per cent ad valorem, under paragraph 60 of the act of Congress entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," adopted August 27, 1894, which said merchandise was imported into the United States at the said Port of San Francisco, Califor-

nia, and entered at the Customhouse thereof March 19, 1895, which said merchandise is more fully described as being the merchandise subject to consumption entry No. 3652, made at said Customhouse at said port; and

Whereas, said Southern Pacific Company has duly filed its application and petition for a review of said decision, praying, among other things, that the said Board of United States General Appraisers be ordered to return to this Court the records and evidence taken by them in said case, together with a certified statement of the facts involved in such case, and their decision thereon:

Now, therefore, upon consideration of the premises, upon motion of Fred'k B. Lake, attorney for said applicant and petitioner, it is hereby ordered that the three United States General Appraisers on duty at the Port of New York, State of New York, do, with all convenient speed, return to this Court the record of said matter and the evidence taken by them therein, together with a certified statement of the facts involved in said case, and their decision therein.

And it is further ordered that this order be entered upon the minutes of this Court, and served by the United States Marshal for the Southern District of New York on each member of said board of three general appraisers, by delivering to each of them a certified copy thereof.

JOSEPH McKENNA,

Judge.

[Endorsed]: Filed and entered Sept. 8th, 1896. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY, for Review of Decision of United States General Appraisers, Relative to Classification of Certain "Creosote" Merchandise Imported by said Southern Pacific Company. } No. 12,247.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

I, W. J. Costigan, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order of Court, signed, filed and entered herein on the 8th day of September, 1896, in the above and therein entitled matter, as the same remains of record and on file in the office of the clerk of said Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 8th day of September, A. D. 1896.

[Seal] W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern Division of California.

[Endorsed]: I hereby certify that on the 22 day of September, 1896, at the city of New York, in my district, I personally served the within order upon George H. Sharpe, one of the within named United States General

Appraisers, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby certify that on the 23 day of September, 1896, at the city of New York, in my district, I personally served the within order upon George C. Tichenor and H. M. Somerville, two of the within named United States General Appraisers, by exhibiting to each of them the within original, and at the same time leaving with each of them a copy thereof.

Dated Oct. 1, 1896.

JOHN H. McCARTY,

United States Marshal, Southern District of New York.

Filed Oct. 6th, 1896. W. J. Costigan, Clerk.

In the Circuit Court of the United States for the Northern District of California.

J. P. LAKE, [Seal]
Chief Clerk, Board of U. S. General Appraisers.

In the Matter of the Application of the SOUTHERN PACIFIC CO., for a Review of the Decision of the Board of U. S. General Appraisers as to the Rate, etc., of Duty on Certain Distilled Oil Imported by Them in the Vessels and on the Dates Named Herein.

Suit No. 1350. Return of the Board of United States General Appraisers to the order of Hon. Joseph McKenna, Circuit Judge. Dated New York, Oct. 16, 1896.

Return of Board of U. S. General Appraisers.

The Board of United States General Appraisers, sitting at New York, in response to the order of the Court

in the above matter, make the following return of the record and evidence taken by them in the above matter, and of the facts involved therein, as ascertained by them.

They state that a letter, hereto annexed, marked Exhibit "A," was received from the Collector of Customs at San Francisco, submitting, under the provisions of section 14 of the act of June 10, 1890, the letter from the naval officer, marked Exhibit "B," and the protest, marked Exhibit "C," and described as follows:

Colls. No.	Board No.	Protestants.	Vessel.	Date of Entry.
3652	27026–B.	Southern Pacific Co.	Rail.	Mar. 19/95.

The report by the U. S. Appraiser referred to in Exhibit "A" is annexed as Exhibit "D," and the samples referred to therein are returned under another cover, marked "Samples in Suit 1350|1."

In their consideration of said protest the Board had before them certain testimony heretofore taken in regard to goods similar to those covered by the protest herein. A copy of said testimony is annexed as Exhibit "E," being testimony taken in the matter of the following protests, viz.: 5556-F, 5734-F, 7544-F, 8358-F, 2289-F, 3277-F, 5303-F, 96222-A, 96801-A, 96802-A, 96218-A, 98418-A, 99306-A, 602-F, 1116-F, 2572-F, and 8794-F.

On July 27, 1896, the Board rendered their decision herein, a copy of which is annexed as Exhibit "F."

A copy of a report of the U. S. Chemist at New York, to whom the samples were submitted for analysis, is annexed as Exhibit "G."

Exhibit "A."

Customhouse, Port of San Francisco,
May 8, 1895.

I submit herewith the protests described below with the accompanying invoices against my assessment of duty at the rate of 25 per centum ad valorem on certain

liquid creosote or creosote oil, claimed to be a coal tar preparation n. o. p. f., returned by the Appraiser as distilled oil, and assessed with duty under par. 60, act of August 28, '94, in accordance with Boards' ruling of Mar. 24, '91. (S. S. 10958.) The requirements of section 14, act of June 10, 1890, have been complied with by the protester. Invoices and Appraisers' report are inclosed; samples sent separately.

Respectfully yours,

E. B. JEROME,

Spl. D. Collector of Customs.

To the Board of U. S. General Appraisers, New York.

Invoice No.	Name of Importer.	Vessel.	Date of Entry.
3652	Southern Pacific Co.	Rail.	Mch. 19/95.
4375	" " " "	"	" 30 "

Enclosed please find report of N. O. also.

Note.—In transmitting protests, the requirements of article 63, Regulations of August 7, 1890, should be strictly complied with. The number of inclosures should always be stated, and, in counting the same, each separate, detached paper, or group of papers (fastened together by pins, mucilage, or otherwise), should be counted as one.

(Ed. 6-27, '93-5,000.) T. B. No. of inclosures, 1.

[Endorsed]: 27026-B. Port of San Francisco, May 8, 1895. John H. Wise, Collector of Customs. Transmits protest of the Southern Pacific Company, against classification of liquid creosote or creosote oil as a distilled oil under par. 60, N. T. No. of inclosures, 1. Received by Board of U. S. General Appraisers May 13, 1895.

Exhibit "B."

PROTEST.

San Francisco, April 13, 1895.

To the Collector of Customs, District and Port of San Francisco:

Sir: We hereby protest against the liquidation of our entry, and the assessment and payment of duties as exacted by you on 2200 casks coal tar product, upon which duty has been assessed at twenty-five per centum ad valorem under par. 60, act of Aug. 28, 1894, as distilled oil; marks and numbers said to be P. I. C., or no marks, but this protest is intended to cover and apply to all the goods of the same kind and character mentioned in the invoice or entry, whether specifically mentioned herein or not.

Said merchandise was imported by us on the 19 day of March, 1895, in the railroad from New Orleans, and is more fully described in consumption entry Mar. 19, '95, No. 3652.

The grounds of our objections are that the article in question is not a distilled oil, but is, at ordinary temperature, a solid waxy crystal, the chief constituents of which are naphthalene, tar acids, and pitch, and as such should be admitted, free of duty under par. 443 of act of Aug. 28, 1894, as product of coal tar not specially provided for.

We pay the amount exacted solely to obtain possession of the goods, and claim that the entry should be re-adjasted, and the amount overcharged refunded to us.

We also give notice that we intend the duplicate protest, herewith submitted for transmission by you to the Board of General Appraisers, under the rules of your of-

fice, to be, as well, an appeal to the Secretary of the Treasury from your decision.

Yours respectfully,
SOUTHERN PACIFIC CO.
By W. H. WHITELY,
Attorney.

[Endorsed]: Entry No. 3652. Bond No. ——. Protest. San Francisco, Apr. 13, 1895. Messrs. Southern Pacific Co. against liquidation of entry, assessment, and exaction of 25 per cent on coal tar product. Vessel, railroad. From New Orleans. Date of arrival, Mar. 19, 1895. Date of Entry, Mar. 19, 1895. Southern Pacific Co. Adjuster's Office. Customhouse, S. F., Cal. Received Apr. 13, 1895.

Exhibit "C."

Office of the Naval Officer of Customs,
Port of San Francisco, May 7th, 1895.

Hon. John H. Wise, Collector of the Port:

Sir: The protest of the S. P. R. R. Co., invoices Nos. 3652-4375, against duty on certain dead oils, is overruled, it being my opinion that S. S. 10958 cover the case.

Respectfully,
JOHN P. IRISH,
Naval Officer.

[Endorsed]: Port of San Francisco, Cal., Naval Office, May 7, 1895. John P. Irish, Naval Officer. Subject: Protest of S. P. R. R. Co., Entry Nos. 3652-4375. Dead oils or liquid creosote. No. of inclosures, 5, and accompanying samples. Received by Board of U. S. General Appraisers, May 13, 1895.

Exhibit "D."

Port of San Francisco, Cal.,
Appraiser's Office, April 18th, 1895.

Hon. John H. Wise, Collector of Customs:

Sir: The protest of the Southern Pacific Company against the return of certain liquid creosote covered by invoices 3652 and 4375 is not well taken. The Special Examiner of Drugs reports that the creosote in question is a product of certain series of hydrocarbons in the coal tar. Coal tar is composed of the following hydrocarbons of the aromatic group. Commencing with benzol, xylol, naphthal, carbolic acid, dead oils or heavy oils, naphthalene, anthracene, pyridine basis, or pitch according to their distillation point or temperature. Benzole has the lowest, and pitch has the highest, distillation point. Tar is also more or less mixed with ammonia and water.

The samples herewith submitted are the product of the middle group of these series, and could not be prepared by fractional distillation, thus showing clearly that they are a distillation product of the coal tar. The importations in question are covered by S. S. 1095S, and were correctly returned as distilled oil.

Yours respectfully,
JAMES C. TUCKER,
Appraiser.

Invoices and protests inclosed.

[Endorsed]: Port of San Francisco, Cal., Appraiser's Office, April 18th, 1895. James E. Tucker, Appraiser. Subject: Report on protest of the Southern Pacific Company. Invoiced 3652 and 4375. No. of inclosures, 4, and samples accompanying.

Exhibit "D."

Office of the Appraiser of Merchandise,
Port of New York, N. Y., June 25th, 1896.

(Copy.)

Dr. Edward Sherer, Chemist in Charge:

Sir: Referring to a sample, marked "27026-B," submitted with letter of transmission, "27026|7 B," dated June 8th, 1896, from Hon. Geo. C. Tichenor, President, Board of General Appraisers, I have to report that the sample has a specific gravity of 1.05028, and contains, approximately, 5 per cent of carbolic and cresylic acids, the remaining 95 per cent being made up of the usual constituents of the ordinary dead oils of commerce, consisting almost wholly of naphthalene and its derivatives, with the basic oils, parvoline, collidine, coridine, leucoline, and bitumens dissolved therein. The merchandise, as a whole, is an oily body and complicated mixture of complex chemical compounds, and also a product of coal tar eliminated by distillation.

Respectfully submitted,
HAYDN M. BAKER,
Chemist.

Approved:
EDWARD SHERER,
Chemist in Charge.

Approved:
WALTER H. BUNN,
Appraiser.

Exhibit "E."

Before Board A, U. S. General Appraisers.

In the Matter of the Classification Under the Tariff Act of Certain so-called Dead Oil. The MICA ROOFING CO., Protestant.	Protests.	
	96222A	5556F
	96801A	5734F
	96802A	7544F
	2289F	8358F
	3277F	

Testimony.

Present: General Appraiser TICHENOR.

Appearances: For the Treasury Department: WM. J. GIBSON, Esq.

For the Protestant: ALBERT COMSTOCK, Esq.

H. J. WEBSTER, Stenographer.

Protests 96222A, etc., page 2.

New York, June 26, 1896.

WM. H. H. CHILDS sworn.

Examined by Mr. COMSTOCK:

Q. Give your full name to the stenographer, please.

A. Wm. H. H. Childs.

Q. Your business or occupation?

A. I am one of the proprietors of the Mica Roofing Co.

Q. The business of which concern is what?

A. Distillation of coal tar, and manufacture of roofing materials.

Q. Are you personally familiar with the imported commodities of that company? A. I am.

Q. And can identify them by invoice descriptions?

A. I can.

Q. Do you know what was the body which was described on some of your invoices as so many barrels of coal tar product? A. Yes, sir.

Q. Was all of the merchandise imported by your concern and described on its invoices as so many barrels of coal tar product one and the same substance, Mr. Childs?

A. It was.

Q. Are you familiar with the product described on some of your invoices as "blast furnace creosote oil"?

A. I am.

Q. Was all the merchandise imported by your house same thing? A. It was.

and described as blast furnace creosote oil one and the

Q. Are you familiar with the merchandise described on some of your invoices as crude carbolic acid?

A. I am.

Q. Was all merchandise so described on any of your invoices one and the same thing? A. It was.

Q. Mr. Childs, you have stated that you are familiar with the products under all of these names, and that each name always meant one and the same thing. Now, state whether all those names meant one and the same thing.

A. They did.

Q. Have you a sample of that thing?

A. I have.

(Witness presents sample in a bottle. Sample marked "Exhibit 1, 96222A," etc.)

Q. Do you know that the merchandise in this bottle represents any of your imported goods?

A. All the oil as it is received is emptied from the barrels and pumped into one large receiving tank. I went over yesterday and drew that, or had it drawn, myself.

Q. Under your personal supervision?

A. Yes, and it has been in my possession ever since.

Q. Is anything else put in this tank except this imported material of yours? A. Nothing at all.

(Counsel for the protestant offers Exhibit 1 in evidence.)

By Mr. GIBSON:

Q. This sample is not a part of any of the goods included in these invoices on which you have protested, is it? A. Part of all of them.

Q. I understand you to say you took this sample out yesterday? A. I did.

Q. Have all the goods in those invoices been in that tank ever since these goods were imported?

A. Part of it has, certainly; it has been drawn from as we use it, and as the oil comes in, it is put into the

tank, and it is a sample of the oil as received.

Q. How long do you ordinarily keep your oil in the tank—this dead oil?

A. It depends on its use; sometimes we are busy and we use it very fast; then we have oil constantly coming in to replace it.

(Counsel for the protestant admits that the article is dead oil.)

Q. Has any of this merchandise remained in this tank since March, 1896? A. Yes, sir.

Q. How much of it, about?

A. I couldn't tell you. We are drawing as we use it.

Q. You have been putting in a great deal since that time?

A. No; we have not had much oil coming in of late.

Q. Do you know who manufactures this oil on the other side?

A. I don't know. We buy through our purchasing agent on the other side.

Q. You don't know whether it is the same manufacturer each time or not?

A. I couldn't testify to that.

(Counsel for the Treasury Department objects to the admission of the sample in evidence. (Exhibit 1, 96222A, etc.) Exhibit 1 is admitted in evidence.)

By Mr. COMSTOCK:

Q. I want you to tell me whether all of the merchandise about whose names and character you have been asked, and which you say is represented by the sample Exhibit 1, is practically one thing, or is practically several different things.

A. Practically one thing—dead oil.

Q. Are different portions of your importations put to varying uses, or are they put to various uses?

A. Nine-tenths of it to one use.

Q. And the remaining tenth?

A. We sell it out in a small way.

Q. Is there anything about that remaining tenth that is different from the other nine-tenths?

A. No, sir; nothing.

Q. Now, Mr. Childs, you say you are distillers of coal tar. Have you ever made the same body as is represented by this sample? A. I have.

Q. Tell me what it is made of.

A. It is a product of coal tar, got in the distillation of coal tar.

Q. Have you, in your business, to do with articles known as distilled oils? A. I have.

Q. Is the article about which you have been testifying here included among those known as distilled oils?

A. It is not.

By Mr. GIBSON:

Q. Do you sell this dead oil? A. I do.

Q. As you receive it? A. I do.

Q. Is it ever ordered from you as a distilled oil?

A. Never.

Q. Who do you sell it to?

A. Sell it to paving men for softening pitch; sell it to lamp-black makers; sell it to roofers; sell it sometimes as crude carbolic acid.

Q. It is not what is commonly known as coal tar, the product made from the production of coal gas?

A. Coal tar is obtained by the carbonization of coal in the manufacture of gas.

Q. Now, this article which you say is the same here, and which is called blast furnace creosote oil, is that produced in the same way?

A. Practically the same way.

Q. Is it really produced in the same way?

A. It is the same product, produced in a different way, is the proper way to state it.

Q. The crude carbolic acid that you have testified here to, is that produced in the same way that coal tar is produced?

A. No, crude carbolic acid is quite different from coal tar, and is not produced in the same way.

Q. How is it produced?

A. It is produced from the distillation of coal tar.

By Mr. COMSTOCK:

Q. State positively, if you can, whether or not any protests in the name of your house that are pending before this Board are on the same body as represented by Exhibit 1.

A. I can say they are on the same body.

Q. What can you state about the meaning of the name "blast furnace creosote oil," which is found in some of your invoices, particularly as to the words "blast furnace"?

A. It is a creosote oil that comes from Scotland, produced at the iron works there.

Q. And you have testified that it is produced from coal tar. How does the term "blast furnace" come to be associated with coal tar?

A. They condense their gases and smoke and produce coal tar, which is distilled and makes the so-called black furnace pitch and creosote oil or dead oil.

Q. Are those blast furnaces, then, a recognized source of coal tar?

A. In Scotland, just as much as the gas companies.

By Mr. GIBSON:

Q. Is this blast furnace creosote oil, as you speak of it, when you receive it here, is it in the shape that it is produced at the blast furnace?

A. Yes, exactly, as far as I know, the crude product that comes from the blast furnace.

Q. You never saw it as it is produced there, did you?

A. I never have, no.

Q. And all you know in regard to that fact is hearsay, is it? What you have been told?

A. I sent a man over to investigate, and I have his report.

Q. Then your knowledge is derived from what he told you? A. It was.

Q. And has not this creosote oil gone through a process of distillation? A. It has not.

Q. I understood you to say before, on your cross-examination—perhaps I am mistaken—that all these three kinds of oil have gone through a process of distillation from coal tar?

A. Yes; that is the first primary distillation when they were produced. The coal tar was distilled, not the oil.

Q. And then it became dead oil? A. Yes, sir.

Q. Then this substance that was produced at the furnace, as it was a product there, was then distilled, was it not, and made into a dead oil?

A. The coal tar was distilled in the usual way, and the dead oil produced in the usual way.

By General Appraiser TICHENOR:

Q. You said, in reply to a question from the Government's counsel, that you had never sold dead oil as distilled oil. Now, tell me, did you ever sell any oil as distilled oil by that name?

A. I never remember to have received an order for distilled oil in my life for any of the products that we produce.

Q. Your orders are received, are they not, by their commercial names?

A. By the commercial name of the product.

By Mr. COMSTOCK:

Q. But do you, or do you not, know from your business experience which specifically named products are included in the oils understood in trade as distilled oils?

A. I do.

Q. And was your previous testimony about dead oil not being included in this class based upon such knowledge? A. Yes, sir.

By Mr. GIBSON:

Q. Do you sell this under the name of dead oil?

A. I do.

Q. Do you receive orders for it as such?

A. Yes, sir; the bulk of our business is under that name.

Q. Do all the people who buy from you order it under that name? A. Nine-tenths of them do.

Q. Under what name do the other tenth get it?

A. Crude carbolic acid.

Q. That is the same thing, is it?

A. The same thing; comes out of the same tank.

TESTIMONY IN BEHALF OF THE GOVERNMENT.

ISAAC D. FLETCHER sworn.

Examined by Mr. GIBSON:

Q. What is your business?

A. I am president of the New York Coal Tar Chemical Company; that is part of my business. I have been connected with that concern under various names for thirty years.

Q. Your place of business?

A. Our office is 253 Broadway.

Q. What is the business of your company?

A. Part of it is the distillation of coal tar, and the refining of products, and the sale of roofing and paving materials and ammonia products and other chemical bodies.

Q. Are you familiar with, and does your corporation deal in, a substance that is commonly known as dead oil?

A. Yes, sir.

Q. Please state how long, and to what extent, you have dealt in that merchandise? A. Thirty years.

Q. Will you state, if you know, how dead oil is produced?

A. It is obtained by the distillation of coal tar. Some of it obtained by the distillation of blast furnace tar.

Q. State whether or not, so far as you know, it is all the subject of distillation, or the product of distillation.

A. It is.

Q. Do you know any merchandise that is bought and sold in the market here under the trade name of distilled oil? A. I do not.

Q. If there was any merchandise that was known in trade and commerce here, and sold, under the name of distilled oil, would you be likely to know it.

(Objected to as calling for a conclusion, which the witness is not likely to be able to give.)

Question withdrawn.

Q. Are you familiar with, and do you deal in, oils that are distilled?

A. I deal in no oils other than are obtained from coal tar.

By General Appraiser TICHENOR:

Q. What other oils than dead oil, obtained from coal tar, do you deal in?

A. I deal in what is known as light oil.

Q. Do you deal in benzine or benzole?

A. Yes, but not under the name of oils. I deal in all the coal tar products, but benzole or naphthas are not considered oils in commerce.

No cross-examination.

W. H. RANKIN sworn.

Examined by Mr. GIBSON:

Q. Your place of business?

A. 91 Maiden Lane, New York.

Q. And your business, what is it?

A. Manufacturing roofing materials.

Q. How long have you been in such business?

A. Twenty-four years past.

Q. Do you deal in what is known, and what was known in trade and commerce in this country, in August, 1894, as dead oil? A. Yes, sir.

Q. What is the extent of your dealing in the article?

A. Well, practically small.

Q. How long have you dealt in it?

A. About 24 years.

Q. Will you state, if you know, how dead oil is produced?

A. It is produced by distillation of coal or gas tar.

Q. State, if you know, whether there is any merchandise sold under the trade name of distilled oils?

A. Well that question seems to me is not plain. Of course I do know that there was lots of oils sold as distilled oil, but I never knew of any coal tar product being sold as distilled oil.

Q. Well, the question was, as you don't seem to have understood, did you know whether or not, in August, 1894, and prior to that time, there was merchandise that was bought and sold in the trade in this country under the name of distilled oils?

A. Not of a coal tar product; no, sir.

No cross-examination.

By General Appraiser TICHENOR:

Q. Do you know of any article having the trade name of distilled oil?

A. As I said before, not of a coal tar nature or product.

Q. Well, of any nature or product?

A. Well, yes; we call petroleum a distilled oil.

Q. But is that bought and sold by the name "distilled oil," or by the name "petroleum"?

A. I don't know of any product where they bill it, list it, or advertise it as a distilled oil. I don't know of any.

By Mr. COMSTOCK:

Q. Your answer wherein you referred to petroleum—did that include crude petroleum, or only refined?

A. The refined.

ISAAC D. FLETCHER recalled for cross-examination.

Examined by Mr. COMSTOCK:

Q. Mr. Fletcher, you testified that dead oil was produced from coal tar or blast furnace tar, if I understand you aright. Do you know from what substance blast furnace tar comes? A. Yes.

Q. What?

A. It is tar that is produced by the condensation of the gases in the blast furnace operations at the blast furnaces.

Q. Gases of what?

A. The gases of coal.

Q. Then it is a coal tar, is it not?

A. Well, it may be classed under that head, but the process is different from what is ordinarily known as coal tar.

Q. It is not gas coal tar, but blast furnace coal tar, is it not?

A. Well, of course, it comes from coal, but it is an entirely different product from what is known as coal tar. They would not pass, one for the other, in commerce.

Q. Neither one variety could be mistaken for the other variety? A. No.

By General Appraiser TICHENOR:

Q. But, Mr. Fletcher, is this blast furnace tar known as coal tar?

A. I think not; I think it is known as blast furnace tar, to distinguish it from coal tar.

By Mr. COMSTOCK:

Q. Is blast furnace tar a product which, to your knowledge, is bought and sold at wholesale in the markets of this country?

A. It is not obtained in this country at all.

Q. Either from blast furnace or in the market, you mean?

A. I mean to say it is not produced here.

Q. Is it a commodity bought and sold in the wholesale markets of this country, to your knowledge?

A. Well, I should say not; I think it is only known here as an imported article, purchased by certain tar distillers.

Before Board A, U. S. General Appraisers.

In the Matter of the Classification of Certain so-called "Dead Oil." WARREN CHEM. & MFG. Co., Protestant.	Protests,	
	96218 A	1116 F
	98418 A	2572 F
	99306 A	8794 F
	602 F	

Testimony.

Present: General Appraiser TICHENOR.
Appearances: W. J. GIBSON, Esq., for the Government.
ALBERT COMSTOCK, for the Protestants.
H. J. WEBSTER, Stenographer.

Protests 96218A, etc., page 2.

New York, June 26, 1896.

ALFRED H. SMITH sworn.

Examined by Mr. COMSTOCK:

Q. State your full name to the stenographer.

A. Alfred H. Smith.

Q. And your occupation.

A. Superintendent of the factory of the Warren Chemical and Manufacturing Company.

Q. What is the nature of the operation as carried on in that factory?

A. Distillers of coal tar and manufacturers of roofing materials.

Q. Are you familiar with the product which has been imported by your company, and which is described on its invoices as "blast furnace creosote oil"?

A. Yes, sir.

Q. Have you seen that body in the condition in which it has been imported and operated upon it at your works?

A. I have, sir.

Q. Are you equally familiar with the article which has been imported by your company and described as so many barrels of coal tar product? A. Yes, sir.

Q. Are you equally familiar with the merchandise which was subject of your importation per "Croma," and of the informal or appraisement entry which I now show you? A. Yes, sir.

Q. What was, or what were, all of those articles, Mr. Smith?

A. Well, some of those importations were coal tar; the others were dead oil—what is commercially known in this country as dead oil.

Q. By coal tar, do you mean the tar in its original and entire body?

A. Yes, sir; its original consistency.

Q. That was the subject of the informal entry that I have shown you, was it not? A. Yes, sir.

Q. And of no other? A. No other.

Q. Now, please produce a sample representing the merchandise described by any one of the names that I have read you, and state which name or names it represents.

A. Here is a sample of dead oil, by steamer "Manitoba."

(Sample marked Exhibit 1, 9621SA, etc., June 26, 1896.)

By the WITNESS.—Also sample of dead oil, per "Croma."

(Sample marked Exhibit 2, 9621SA, etc., June 26, 1896.)

By the WITNESS.—Also sample marked dead oil, 1895, taken from one of these importations.

(Sample marked Exhibit 3.)

Q. How do you know that each of these samples represents some of your imported product?

A. I have taken them from the barrels that we imported.

Q. At the works?

A. Yes, sir; I took those myself.

Q. That is true of all of them, is it?

A. Yes.

(Counsel for the importer offers the samples in evidence.)

By Mr. GIBSON:

Q. Referring to sample 1, was that taken out of any

particular cargo or importation that you can recall yourself?

A. Yes, sir; that was taken out of a lot of this oil that was imported and came here by the "Manitoba."

Q. Is that sample No. 1 a part of the merchandise as to which you have protested here? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. Now, in regard to sample No. 2; that, you say, arrived by the "Croma"? A. Yes, sir.

Q. Is that sample a part of the merchandise as to which you have protested, that arrived by the "Croma"?

A. Yes, sir; taken out of one of the barrels of that lot, landed on our dock.

Q. As to which you have protested?

A. Yes, sir.

Q. Can you identify that by the protest?

A. Well, I know that those are protested.

Q. Well, will you just look at the protest by the "Croma" and see as to which protest that merchandise was a part.

By Mr. COMSTOCK.—I object to the form of the question, and insist that the witness should identify the sample with the entry, and not with the protest. There is no indication that he has anything to do with the protest.

By General Appraiser TICHENOR.—The protest is made upon merchandise imported by the "Croma," so that it seems to me that the identification of the goods by the "Croma" is all that is necessary.

(Invoice No. 2301, included in entry per "Croma," No. 133104, shown witness.)

By the WITNESS.—I identify that as being a sample of that particular invoice.

By Mr. GIBSON:

Q. Now, in regard to sample No. 3, what merchandise is that a sample of?

A. That is a bulk sample of two or three different lots, which were taken from a tank where the barrels were emptied and pumped into this tank, and I can't tell which vessel that identical sample was from.

By General Appraiser TICHENOR:

Q. I understand you to say, Mr. Smith, that it is a bulk sample representing several importations that had been emptied together in a tank. A. Yes, sir.

By Mr. GIBSON:

Q. You can't identify it as to any particular one?

A. No, sir.

Q. Can you identify it as to any particular number of invoices that are here?

A. No, sir; I would not feel safe in doing that. That is a sample of the imported oil, but to say which vessel it was, I couldn't say.

By General Appraiser TICHENOR:

Q. Are you certain, Mr. Smith, that it is a sample of importations that are subject of protest here?

A. Yes, sir; I am certain that this is a sample of the imported oil, of which I understand there is a protest. I don't know how many there are protests on, or anything about that; only that there are protests

By Mr. GIBSON:

Q. Have these samples been in your possession ever since they were taken out?

A. Yes, sir.

Q. And you are certain, are you, that they are in the same condition now that they were when you took them out of these packages? A. Yes, sir

By Mr. GIBSON.—As to the sample No. 3, I don't think there is any connection with that with any particular invoice, nothing to show but what some foreign substance was put in this tank.

By the WITNESS.—There is no foreign substance in there, because they were simply pumped into the tank, the difference being where you take three barrels and

put them together, or whether you take from each individual barrel.

By Mr. GIBSON.—I make no objection to samples 1 and 2. No. 3, I don't think has been identified as belonging to one of these importations, and I don't think it ought to be taken as a sample of this merchandise.

By General Appraiser TICHENOR.—The Board will take it for what it is worth.

By Mr. COMSTOCK:

Q. Now, Mr. Smith, tell me what you do with the several importations of the bodies represented by these samples when you get them?

A. They are used for softening pitch.

Q. Do you use all of your importations such as you have identified here, and regarding which you have stated that you know what they were—excepting always the simple coal tar—for one and the same purpose?

A. Very nearly so; it is either softening pitch, or softening asphalt.

Q. I mean to say, do you put each and everyone of these importations to the same purpose or purposes to which you put the others? A. Exactly.

Q. There is no distinction between them in that respect? A. No, sir.

Q. Is there any practical distinction between them, in substance, composition, or source?

A. No, sir.

Q. What is their source?

A. They are part of the coal tar.

Q. Part of coal tar? A. Yes, sir.

Q. Have you yourself made, or superintended, the making of these same bodies?

A. Yes, sir; every day.

Q. At your factory in Brooklyn? A. Yes, sir.

Q. And what you have made has been made from coal tar? A. Yes, sir.

Q. And had you means of identifying it in substance and in its entirety with these samples?

A. Yes, sir.

Q. Are you prepared to testify whether or not the different importations represented by these samples and by the protests now before the Board may have varied in precise chemical elements? A. No.

Q. But whether they did or not, would you adhere to your testimony that for use, for name and for all practical purposes, they are one and the same thing?

A. Yes.

Q. Mr. Smith, do you have personal contact in your business with bodies known as distilled oils?

A. We have not in several years.

Q. You have had, in the past, have you?

A. Yes, sir.

Q. And you personally?

A. Yes, sir; I made all the tests myself.

Q. Now, state whether the several varieties of the merchandise covered by your samples and testimony are known as distilled oils. A. No, they are certainly not.

(The last question is objected to as leading.)

Cross-Examination.

By Mr. GIBSON.

Q. How are these products known to you, that you protest as to here, under what heads?

A. How is it known to me, sir?

Q. Yes. A. It is known to me as dead oil.

Q. Are you familiar with the method of manufacturing this merchandise, which you have here?

A. Yes, sir; I have been so for a great many years.

Q. Have you ever seen it manufactured at the place and by the people from whom you purchased on the other side? A. No, sir.

Q. You don't know how they manufacture it there?

A. No, sir; I have never been on the other side of the water.

Q. Who is this manufactured by?

(Objected to, as the witness says he has never been there, and he cannot speak otherwise than as the invoices do.)

A. I do not know who the goods were manufactured by, sir.

Q. Have you ever been informed?

A. Never been informed.

Q. This dead oil is a product that is produced by a process known as distillation, is it not?

A. Yes, sir.

Q. Distillation of coal tar?

A. Yes, sir; it is what is known as the heavy oil; it is the second product from the coal tar.

Q. What is the first product?

A. Water and light oil; they distill at about the same point.

Q. That is taken off, and then the second distillation produces?

A. Produces the heavy oil.

Q. Included in your protests?

A. Yes, sir.

By General Appraiser TICHENOR:

Q. You said you were familiar with distilled oils?

A. Yes, sir.

Q. How are they known?

A. Well, they are known by the product which you want to arrive at. There was a time when there was a demand in this country for benzole and naphthol, and at that time we made benzole and naphthol, and that product is made from the light oil, the part of the oil that comes over with the water, the part of the oil which is lighter in specific gravity than the water.

Q. What I was going to ask you is, are they known by

their commercial names as benzole or naphthalene, or whatever it is?

A. In the trade, they are, sir; but commercially they would be known as distilled oil. The different products derived from the bases of coal tar are very numerous, some of them having no value, but they can be separated by different formulas of treating with acids, or redistilling, as the case may be.

Q. In trade, are not these oils known by their names, such as benzole or dead oil or what not, rather than by the term "distilled oil"? A. Yes, sir.

Re-direct Examination.

By Mr. COMSTOCK:

Q. What I want to know is, Mr. Smith, as to these articles about which you have testified in answer to the questions of the General Appraiser, whether they are or are not included in a class of articles known as distilled oils.

(Objected to as leading. Objection overruled.)

A. In relation to benzole and naphtha, it would be known as distilled oil.

Q. And does, or does not, that class include the articles represented by the three samples you have produced.

A. It does not include them.

By General Appraiser TICHENOR:

Q. Are or are not benzole and naphthol produced by the same process from coal tar as dead oil?

A. No, sir, it is not.

Q. How are they produced?

A. They are produced by redistillation, in the first place, and then treating with acid, and neutralizing the acid afterward, and a second fractional distillation.

Q. It is a process of distillation or fractional distillation in either case, is it not?

A. And treating with acids and neutralizing the acids afterwards.

Q. Then I understand the treating with the acids would be the only difference in the process?

A. There is a vast difference, because you observe, your temperatures; you have to get your boiling points to a certain given point; for instance, if it was 90 per cent, or 50, or 30, benzole we are making, we would have to run them different in that way.

Q. Then it is a question of temperature rather than process, isn't it?

A. Yes, but the temperature being part of the process.

Q. In either case, it is a process of distillation and fractional distillation, is it?

A. Yes, sir, in connection with what is termed "treating."

By Mr. COMSTOCK:

Q. Treating in the case of the dead oil, or only in the case of the other bodies?

A. No, no treating of dead oil; only in the case of the benzole and naphtha.

Q. Is there as much difference, Mr. Smith, between the processes of producing dead oil and those for producing the products which are known as distilled oils, as there is between the process of producing naphtha and that of producing naphthalene?

(Objected to. Objection sustained.)

Q. Mr. Smith, state how, as to degree or amount, the difference between the processes for producing dead oil, and those for producing benzine and naphtha compares with the difference between the process for producing naphtha and that for producing naphthalene—whether the differences are greater in the first instance, or less.

A. Well, there is really no difference; as soon as your oil is heavie than water, you run that oil off, which

leaves your third body, your residue which would be pitch. You distill off a sufficient amount of this dead oil to leave the pitch at the consistency you want it for use.

Q. Now, you say that, for benzine and naphtha, there are more elaborate processes? A. Oh, decidedly.

Q. Now, I ask you, contemplating that difference between these processes, how it compares with the difference between the process of producing naphtha and that for producing naphthalene. Is it greater or less difference, or about the same difference?

A. The naphthalene is a part of the dead oil, the part that crystallizes in the dead oil; comes over at the same time with the vapors of the dead oil, and is part of the dead oil.

Q. How is it extracted therefrom?

A. Simply decanted off.

Q. Is it a process of precipitation?

A. No, it congeals; it crystallizes; forms a sort of a wax.

Q. Is that the only process intervening between dead oil and naphthalene—that distillation?

A. That takes place at a lower temperature; for instance—it comes over very high, you understand—in the neighborhood of 600 degrees Fahrenheit.

Q. And as it cools, this crystallizes out?

A. Yes, sir.

Q. And that is all there is in the production of naphthalene, after you get dead oil? A. Yes.

Q. Mr. Smith, do you know what that body is which is described on one or more of the invoices as "green oil?"

A. Yes, sir.

Q. What is that body?

A. It is a filtration of anthracene oil.

Q. Produced from what?

A. From coal tar.

Q. How does that compare as to the use it is put to, if you know, with the samples you have mentioned?

A. For the same uses.

Q. Poured right into the same tanks?

A. Yes, sir.

By Mr. GIBSON:

Q. Does the same state of facts apply to that oil as apply to the other?

A. Yes, sir.

Q. Same description, processes, and production?

A. Yes, sir.

By General Appraiser TICHENOR:

Q. Does your firm sell, or has it been selling, dead oils

A. Yes, sir.

Q. Naphthalene? A. Yes, sir.

Q. Benzole?

A. When we were making it, we sold it, of course; it is several years since we made any.

Q. Did you ever have an order or a request for a quotation of anything simply as distilled oil?

A. Not to my recollection; no, sir.

Q. Your orders would come, then, for the things by their name?

A. It would be a specific name.

Before Board A, U. S. General Appraisers.

In the Matter of the Classification under the Tariff Act of so-called "Dead oil." SCHOELKOPF, HARTFORD & MACLAGAN, Protestants. } Protests 91832 A, etc.

Testimony.

Present: General Appraiser TICHENOR.

Appearances: For the Treasury Department, W. W. J. GIBSON, Esq.

For the Protestants, ALBERT COMSTOCK, Esq.

H. J. WEBSTER, Stenographer.

New York, June 26, 1896.

HARRY COMER sworn.

Examined by Mr. COMSTOCK:

Q. What is your business, Mr. Comer?

A. I am superintendent of the Lehigh Valley Creosoting Company.

Q. Were any importations made for the interest of your company, and at its desire, by anyone else than the company itself, and if so, by whom?

A. Schoelkopf, Hartford & Maclagan.

Q. What was the substance, or what were the substances, which that concern imported at your order?

A. Dead oil.

Q. Dead oil was the only substance , was it, which they imported at your order?

A. Dead oil was the only substance.

Q. Could you recognize a sample as fairly representing those importations, if it were shown you?

A. Certainly.

Q. Have you had opportunities for personal examination of the product about which you are testifying?

A. Yes, sir.

Q. And have used such opportunities?

A. Yes, sir.

Q. Examine Exhibit 1, in case 96222A, and state whether or not that properly represents the article you have been testifying about.

A. I recognize that as dead oil.

Q. And as fairly representing the dead oil imported for you by Schoelkopf, Hartford & Maclagan?

A. Fairly, I guess.

Q. Mr. Comer, do you know what the product was about which you have been testifying, and which you say is fairly represented by the sample which has been shown you? A. I know it.

Q. What was it? A. It is dead oil.

Q. What was it by derivation? What was it derived

from, if you know? A. Coal tar.

Q. Have you yourself witnessed the production of it?

A. I have

Q. Where?

A. In nearly every tar distiller's works in England and Scotland.

Q. Had it any other name in the markets of this country than dead oil?

A. Yes, sir.

Q. What? A. Carbolic acid.

Q. Have you both bought and sold the article in the markets of this country? A. I have.

Q. For how long past? A. Right along.

Q. For how many years?

A. For the last ten years.

Q. Are you prepared to testify whether or not different lots of it may vary in precise chemical constitu ents or formula?

(Objected to as leading. Objection overruled.

A. I am not.

Q. Irrespective of such question of variation, is there any practical difference between one and another of the importations of the body you have testified about, in use, in name, or in trade status.

(Objected to. Objection overruled.)

A. No, not to my knowledge.

Q. How extensively have you used it?

A. Thousands of gallons.

Q. What do you do with it when it first arrives here?

A. As I have use for it, I dump it into my tanks.

Q. And do you dump it all as it comes right into the same tanks or into different tanks, according to any possible difference between—

A. Into one tank.

By Mr. GIBSON:

Q. Are these the same kind of goods that are imported by Schoelkopf, Hartford & Maclagan?

A. Yes, sir.

Q. They are the same kind?

A. Yes, sir.

Q. The same kind of goods that have been imported by them for the last four or five years, are they?

A. Yes, sir.

Q. Is not this product, which you call dead oil, known in England and Scotland as tar oil or creosote oil?

A. It is known as creosote oil, by name.

Q. And also as tar oil? A. Also as tar oil.

Q. And that is the same as this article here which is known as dead oil, is it not? A. Yes, sir.

Q. Is there any substance that is sold in the markets here under the name of a distilled oil? A. Lots.

Q. Well, for instance, what?

A. Refined petroleum is distilled oil.

Q. Well, I know it is distilled oil, but is it bought and sold and known in trade under the name of distilled oil, and bought and sold under that name?

A. As a trade name?

Q. Yes. A. Not that I know of.

Q. Well, I know it is distilled oil, but is it bought and here under the trade name of distilled oil?

A. I do not, sir.

Q. There are three methods of producing oils, are there not, by distillation, and by pressure or compressure, and by rendering, are there not?

(Objected to on the ground that the witness has not been shown to have any knowledge as to what has been known as distilled oils. Question withdrawn.

New York, June 29, 1896.

JAMES HARTFORD sworn.

Examined by Mr. COMSTOCK:

Q. Of what firm or concern are you a member, Mr. Hartford?

A. Schoelkopf, Hartford & Maclagan, Limited.

Q. Is that firm the one that has made these numerous protests that are up for hearing to-day? A. Yes.

Q. Are you personally familiar with the merchandise imported by that firm? A. I am.

Q. Examine invoice in 91832A, and state whether you know what the article was which it described.

A. I do.

Q. I notice that the description in this invoice is so many barrels of coal tar product. Have you had the same kind of merchandise under any other names that you can recall—any other invoice names? A. Yes.

Q. What others do you think of?

A. Dead oil of coal tar, crude carbolic acid, coal tar product, coal tar preparation.

Q. How about the name blast furnace creosote oil? Has it sometimes come so invoiced, or do you know an article which would be described by those terms?

A. I do, but we have invoiced it as crude carbolic acid.

Q. Would you recognize what was meant by each of these names that I have given you or which you have stated? A. Yes, sir.

Q. What would such product be? The product that would be designated by any of these several names, or all of them?

A. It would be coal tar creosote. Some of them might be blast furnace.

Q. And the others derived from what source?

A. From coal tar.

Q. Now, I want you to tell me whether you deal at wholesale in coal tar. A. Yes, we do.

Q. In the markets of this country?

A. In the markets of this country.

Q. How long have you so dealt?

A. Well, my firm has dealt for the last eight years, but I have dealt long before that.

Q. Tell me what are the known and recognized sources of the product which is dealt in as coal tar in the markets of this country?

A. The great source of coal tar is the gas works.

Q. Is there any other source?

A. Yes, there is the blast furnace process, but that is not used in this country, as far as I know.

Q. But is abroad? A. Yes, in Scotland.

Q. Do you say, then, that coal tar is produced from blast furnaces as well as from gas works?

A. Yes, certainly.

Q. State, so far as you know, the process by which coal tar is produced at blast furnaces.

A. The coal is mixed with the iron in a large crucible furnace, and the blast is applied and the fumes are condensed, and the coal tar obtained that way.

Q. Have you handled, commercially, this variety as well as the house variety of coal tar?

A. We have imported it.

Q. Is any distinction made between them in the trade?

A. Not that I know of; they sell them, just the one as the other; sometimes people ask for a thin tar, and they give them the blast furnace tar, but there is no difference, as far as that is concerned.

Q. Now, state what relation this coal tar creosote bears to coal tar itself.

A. Coal tar creosote is one of the distillates of coal tar that is obtained when the coal tar is distilled, along with a lot of other products.

Q. Examine Exhibit 1, 96222 A, and state what it is, if you can tell.

A. I would recognize it as coal tar creosote.

Q. The same commercial body about which you have testified as being covered by your own protests?

A. Yes.

Q. To what use, as far as you know, is this body put, Mr. Hartford?

A. There are a great many uses; it is used for making lamp-black, used for creosoting lumber; used for disinfecting, as crude carbolic acids, and I think there are a variety of other uses. It is used for painting wood to preserve it. I think it is also used for burning or illuminating, but not in this country.

Q. Does your house deal in any body or class of bodies known as distilled oils?

A. I don't know anything of that kind that we deal in.

Q. You don't use the term in your line of goods?

A. No; not at all.

Q. But you say you have dealt at all times for the last ten years and more in this product about which you have testified A. Yes, sir.

Q. Mr. Hartford, does the testimony you have given apply to all the importations made in the name of your house, irrespective of for whose use or interest they may have been made, and upon which you have protests now pending before this Board, in which you claim the right to free entry of the product as a preparation of coal tar?

A. They do.

Mr. COMER recalled.

Examined by Mr. COMSTOCK:

Q. Mr. Comer, have you personally dealt at wholesale in coal tar in the markets of this country?

A. I have.

Q. For how long? A. Ten years past.

Q. State what the body is which is known and has been known as coal tar in the markets of this country for ten years past, in relation to its source.

A. One source.

Q. What is its source? A. Coal.

Q. By what process or processes is it derived from that source?

A. At gas works, in the manufacture of coal gas, and at blast furnace works, when they are making iron.

Q. Do you say that the product both of the blast furnaces and of the gas works is known as coal tar commercially in this country?

A. I believe it is; to my knowledge it is.

Q. Have you dealt in both varieties?

A. I have.

Q. Is any distinction made between them in the trade, in respect of their being called or not called coal tar?

A. No, excepting that perhaps someone might call it, or designate it, blast furnace coal tar, and another house might go to work and ask me for gas coal tar, but it is both coal tar.

By Mr. GIBSON:

Q. Have you ever seen what you have denominated blast furnace coal tar produced? A. Yes, sir.

Q. Been at the furnace where it was produced?

A. Day by day.

Q. Have you ever imported any of it?

A. I have.

Q. When?

A. I imported it in the vessel "Lidskjalf;" I don't remember the date.

Q. Is there much of that kind of coal tar imported here?

(Objected to as irrelevant and immaterial. Question withdrawn.)

Mr. HARTFORD recalled as for cross-examination.

By Mr. GIBSON:

Q. Have you ever seen the blast furnace coal tar produced? A. No, sir; I have not.

Q. All that you know about it is what you have been told?

A. What I have been told and what I have read in books.

Q. Have you ever imported any of it for your firm?

A. Yes, sir.

Q. Does your firm ever buy or sell any oil under the name of distilled oil? A. No, sir.

By General Appraiser TICHENOR:

Q. Mr. Hartford, you testified that these bodies, described by various names in your invoices, are known to you as coal tar creosote? A. Yes, sir.

Q. Are they known as dead oil?

A. Dead oil of coal tar.

Exhibit "F."

(Not for Publication.)

In the Matter of the Protest 27026B-3893 and 27027B-3894 of SOUTHERN PACIFIC CO. against the Decision of the Collector of Customs at San Francisco, Cal., as to the Rate and Amount of Duties Chargeable on Certain Tar Oil Imported per Railroad from New Orleans and Entered March 19, and 30, 1895.

Before the U. S. General Appraisers at New York, July 27, 1896.

Opinion by TICHENOR, G. A.—The merchandise here in question was imported in casks, and is described in the invoices as "liquid creosote."

It was assessed for duty at 25 per cent ad valorem under the provisions in paragraph 60, act of August 28, 1894, for "distilled oils," and is claimed by the protestants to be exempt from duty under paragraph 443 of said act.

We find as facts, from the testimony of Doctor Haydn M. Baker, chemist in the laboratory attached to the Appraisers Office at New York, to whom samples of the merchandise were submitted for chemical examination, and from knowledge acquired in the consideration of other cases relative to merchandise of the same general character:

(1) That the merchandise in question is a liquid substance, of a dark brown color and tarry odor, of the specific gravity of 1.05028, and is known generally in commerce as dead oil and creosote oil.

(2) That it is derived from coal tar by distillation, and is a distilledoil. Its chief constituents are naphthalene and its derivatives, along with the basic oils parvoline, coridine, collidine, and leucoline, and bitumens dissolved therein, together with five per cent of crude phenol of the carbolic and cresylic acid types.

It is understood that the protestant contends that the merchandise is not dutiable as assessed, upon the ground that it is not commercially known as a distilled oil. It is not necessary that it should be so known to bring it under that provision. The various oils known to commerce are distinguished in trade by arbitrary names, such, for example, as olive oil, croton oil, lemon oil, cod-liver oil, castor oil, aniline oil, etc., and are not known in commercial sense as "distilled oils," "essential oils," "ex pressed oils," or "rendered oils." These terms are technical, and are used to distinguish the different oils according to the method of their production. It is not disputed that the article here in question is obtained by distillation, and hence, in the sense of the tariff, is known as distilled oil. The provision for distilled oils in paragraph 60 is more specific than the general provision for preparations and products of coal tar in paragraph 443 of the act.

This view is in harmony with the doctrine of the recent decision of the United States Circuit Court of Ap

peals for the Second Circuit, in the case of Matheson & Co. vs. The United States (71 Fed. Rep. 394), to the effect that the provision for "acids" in paragraph 473, act of Oct. 1, 1890, is more specific than the general provision for "all preparations of coal tar not colors or dyes," in paragraph 19 of the act.

These protests are overruled on all grounds. (See G. A. 453 and 942.)

(Signed) H. M. SOMERVILLE.
CHARLES H. HAM.
GEO. C. TICHENOR.

And for a certified statement of the facts involved in said matter, as ascertained by them, the said Board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said Board than such as are shown by said decision and other exhibits hereto attached.

H. M. SOMERVILLE,
F. N. SHURTLEFF,
GEO. C. TICHENOR,
Board of U. S. General Appraisers.

[Endorsed]: Filed October 22, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY, for Review of Decision of the Board of United States General Appraisers, Relative to the Classification of Certain "Creosote" Merchandise Imported by said Southern Pacific Company.

Findings of Fact and Conclusions of Law.

This cause and proceeding having come on regularly for hearing and determination before the Court in the

manner provided by law and the act of Congress of June 10, 1890, and evidence, oral and documentary, on behalf of appellant and respondent having been introduced, heard, and considered, and the Court, after duly considering the law and the evidence, and being fully advised in the premises, having heretofore, on the 16th day of August, 1897, given and rendered its opinion herein:

Now, in accordance therewith, hereby makes and renders its decision, finding the following facts and conclusions of law respecting the classification of the merchandise involved herein, and the rate of duty imposed thereon under such classification:

I.

Findings of Fact.

The merchandise in question, consisting of 2,200 barrels of the article hereinafter mentioned and described in the invoices as "liquid creosote," was imported from London, a port in the Kingdom of Great Britain, into the United States of America, at the Port of San Francisco, State and Northern District of California, on the 19th day of March, 1895, by the Southern Pacific Company, and thereupon said merchandise was entered at the Customhouse at said port for immediate consumption.

II.

That thereafter said merchandise was by John H. Wise, as Collector of said Port, classified upon the return of the appraiser of such port as "distilled oil," dutiable at the rate of twenty-five per cent ad valorem, under paragraph 60 of the Tariff Act of August 27, 1894; and said entries were liquidated in accordance with such classification, and the duty upon said barrels of such merchandise so entered for immediate consumption as aforesaid, amounting to the sum of $1,472, was ascertained, levied, and collected by said Collector.

III.

That thereafter said importer, being dissatisfied with such decision of the Collector and said classification of the merchandise involved herein, made and gave due protest and notice of such dissatisfaction, on the ground that the merchandise in question is not a distilled oil, but should be admitted free of duty under paragraph 443 of the act of August, 1894, as a product of coal tar not specially provided for. Thereupon the invoice relating to the importation of said merchandise, and all the papers and exhibits connected therewith were duly transmitted to the Board of United States General Appraisers on duty at the Port of New York, all as provided in said Customs Administrative Act of June 10, 1890.

IV.

That thereafter, on the 27th day of July, 1896, the said Board of United States General Appraisers, after taking evidence therein, made and rendered their decision in said matter, sustaining the decision of said Collector, and overruling said protest, and holding and deciding that said merchandise was not a product of coal tar to be admitted free of duty, but was and is a "distilled oil," and subject to a duty of twenty-five per cent ad valorem, under paragraph 60 of said act of 1894.

V.

That thereafter, in due and proper time, the said importer, being dissatisfied with said decision of the said Board of United States General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification, and in manner and form as required by law and section 15 of said act of June 10, 1890, applied to this Court for a review of the questions of law and fact involved in such decision of the

said Board of General Appraisers; and such proceedings were thereupon had that further evidence was duly taken before a special referee appointed by this Court, and introduced and considered herein as heretofore stated.

VI.

That the merchandise comprising the importation involved in this application and petition for review was, on and before the said 19th day of March, 1895, and now is, known in trade and commerce as "creosote oil," or "dead oil," and was and is a product of coal tar, obtained therefrom by fractional distillation.

VII.

That said merchandise was not, nor is it, a product or preparation commonly or commercially or chemically, or otherwise, known as a distilled oil, but was and is a product of coal tar, not a color or dye, and not otherwise specially provided for in said act.

Conclusions of Law.

As conclusions of law the Court finds:

1.

That this Court has jurisdiction of the matters involved herein.

2.

That the merchandise in question is embraced within the terms and subject to the provisions of paragraph 443 of the Tariff Act of August 28, 1894; is not dutiable, but is entitled to be admitted free of duty under paragraph 443 of the said act.

3.

The decision of the Board of United States General Ap-

praisers herein is hereby reversed and set aside, and the action of said Collector in assessing and liquidating the amount of duties as aforesaid is hereby held to be erroneous.

4.

The importer, Southern Pacific Company, is entitled to a judgment therefor without costs.

Let judgment be entered in accordance herewith.

Dated August 27, 1897.

WM. W. MORROW,
Judge.

[Endorsed]: Filed August 27th, 1897. Southard Hoffman, Clerk.

In the Circuit Court of the United States. Ninth Judicial Circuit, Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY, for Review of Decision of the Board of United States General Appraisers, Relative to the Classification of Certain "Creosote" Merchandise Imported by said Southern Pacific Company.	No. 12,247.

Judgment.

This matter having come on regularly for hearing before the Court upon the pleadings, and the proofs taken and filed herein, counsel for petitioner and for the respondent appearing, and the same having been argued

and submitted to the Court for consideration and decision, and the Court, after due deliberation, having filed its findings and decision in writing, and ordered that judgment be entered herein in accordance therewith, but without costs:

Now, therefore, by virtue of the law and by reason of the findings and decision aforesaid, it is considered by the Court that the merchandise in question in this matter is embraced within the terms and subject to the provisions of paragraph 443 of the Tariff Act of August 28th, 1894; is not dutiable, but is entitled to be admitted free of duty under paragraph 443 of the said act.

It is further considered and adjudged that the decision of the Board of United States General Appraisers herein sought to be reviewed be, and the same hereby is, reversed and set aside, and it is further considered and adjudged that the action of the Collector of Customs for the Port of San Francisco, in assessing and liquidating the amount of duties upon the merchandise in question herein, be, and hereby is, held to be erroneous.

Judgment entered August 27th, 1897.

SOUTHARD HOFFMAN,
Clerk.

A true copy.

Attest:

[Seal] SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: Filed August 27, 1897. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY, for Review of the Decision of the Board of U. S. General Appraisers, Relative to Duty upon Certain Creosote. } No. 12,247.

Certificate to Judgment Roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 27th day of August, 1897.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Judgment roll. Filed August 27, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY, for a Review of the Decision of the Board of U. S. General Appraisers, Relative to the Classification of Certain "Creosote" Merchandise Imported by said Southern Pacific Company.

No. 12,247
and
No. 12,248.

Opinion.

Application by the Southern Pacific Company for a review, under section 15 of the Customs Administrative Act (Act of June 10, 1890; vol. 26 Stat. at Large, 131), of the decision of the Board of United States General Appraisers, relative to the classification for duty of two importations of "creosote" merchandise. Both petitions heard together. Ruling of Board of United States General Appraisers reversed.

JOHN J. De HAVEN, Esq., and F. B. LAKE, Esq., Attorneys for the Southern Pacific Company, the petitioner.

H. S. FOOTE, Esq., U. S. Attorney, and SAMUEL KNIGHT, Esq., Assistant U. S. Attorney, appearing on behalf of the United States.

MORROW, Circuit Judge.—These are two applications, by the Southern Pacific Company, for a review by this Court, under section 15 of the Customs Administrative Act, Act of June 10, 1890 (vol. 26 Stat. at Large, 131), of the decision of the Board of United States General Ap-

praisers, relative to the classification for duty of two importations of "creosote" merchandise. Both petitions were argued together, and precisely the same testimony and the same questions apply to each. The merchandise in question was imported in casks, and is described in the invoices as "liquid creosote." It was imported from London, Great Britain, into the United States at the port of San Francisco. The Collector of the Port of San Francisco classified this "liquid creosote" as a "distilled oil," dutiable at the rate of 25 per cent ad valorem under the provisions of paragraph 60 of the Tariff Act of August 27, 1894, entitled "An Act to reduce taxation to provide revenue for the Government, and for other purposes," and popularly known as the Wilson Tariff Act. (Vol. 28 Stat. at Large, 509, 511.) The importer protested against the imposition of this duty, or any duty, on the ground that the "creosote" in question "is not a distilled oil, but is, at ordinary temperature, a solid, waxy crystal, the chief constituents of which are naphthalene, tar acids, and pitch, and as such should be admitted free of duty under paragraph 443 of act of August, 1894, as product of coal tar not specially provided for." Paragraph 60, under which the "creosote" was classified, provides "Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts, not especially provided for in this act, twenty-five per centum ad valorem." Paragraph 443, one of the provisions placing articles on the free list, and under which the importer contends the "creosote" in question should be classified, provides: "Coal tar, crude, and all preparations except medicinal coal-tar preparations and products of coal tar, not colors or dyes, not specially provided for in this act." The question to be determin-

ed is whether the "creosote" comprising these two importations is a "distilled oil," as found by the Board of United States General Appraisers, and, therefore, subject to a duty of 25 per cent ad valorem, or whether it is a "product of coal tar," within the meaning of paragraph 443, and, therefore, entitled to free entry. The Board of United States General Appraisers overruled the protests of the importer, and found that the merchandise in question "is a liquid substance, of a dark brown color and tarry odor, of the specific gravity of 1.05028, and is known generally in commerce as dead oil and creosote oil; (2) that it is derived from coal tar by distillation, and is a distilled oil. Its chief constituents are naphthalene and its derivatives, along with the basic oils, parvoline, coridine, collidine, and leucoline, and bitumen dissolved therein, together with five per cent of crude phenol of the carbolic and cresylic acid types." While the Board found that the merchandise comprising these two importations was known generally in commerce as "dead oil" and "creosote oil," it also found that it was derived from coal tar by distillation, and that it was a "distilled oil." Additional testimony was taken at San Francisco upon an order of reference by the Court. The evidence preponderates largely in favor of the proposition that the merchandise in question is known commercially as "creosote oil" or "dead oil," and that it is the "product of coal tar" by fractional distillation. The testimony, introduced on behalf of the Government, does not show satisfactorily that "creosote" is chemically, or commercially, or even commonly known and described as a "distilled oil." In Warren Chemical Manufg. Co. v. United States, 78 Fed. R. 810, this same question was before the Court. In that case, the Board of United States General Appraisers had classified certain coal tar products as "pro-

ducts known as distilled oils," under paragraph 60. The importer protested, claiming that it was simply a "product of coal tar, not a color or dye, not specifically provided for," and, therefore, entitled to free entry under paragraph 443. It was held that inasmuch as it had not been shown that the article involved in that case was an oil in fact, or that it was chemically or commercially or commonly known as "distilled oil," the decision of the Board should be reversed, and the article entitled to free entry under paragraph 443 as a "product of coal tar." While "creosote" may be termed an oil, still it is not known as a "distilled oil." It is true that the terms "distilled oils" and "products of coal tar," found respectively in paragraphs 60 and 443, are mere descriptive phrases. No question as to the commercial designation of the merchandise in question can arise, for what is known commercially as "creosote oil," or a "dead oil," are not specifically mentioned in either of these paragraphs or in the act. The terms used seem to refer to the mode of manufacture, and it would appear that the Board held the importations in question to be "distilled oils," because they were produced by distillation—fractional distillation. But while it is true that "creosote" is produced by distillating processes, it is nevertheless also true that, according to the preponderance of the evidence, it is not known as a "distilled oil." That it is a "product of coal tar," there can be no doubt. Such being my view of the evidence, it will, obviously, be unnecessary to consider the other questions discussed by counsel. Even if I were in doubt as to which of these paragraphs applied, such doubt, under the rule of construction relating to tariff acts, would have to be resolved in favor of the importer. (Hartranft v. Wiegmann, 121 U. S. 609, 7 Sup. Ct. Rep. 1240; Twine Co. v. Worthington, 141 U. S. 468,

12 Sup. Ct. Rep. 55.) It may be further observed that, in the Tariff Act of 1883 (vol. 22, p. 493), Congress made a decided distinction between "dead oils," which term is applied to "creosote," and "distilled oils," thereby indicating and recognizing a difference between the two classes of oils, and precluding the inference that the term "distilled oil" might include "creosote" or a "dead oil." The revenue or tariff laws of the United States are regarded as constituting practically one system. (U. S. v. Collier, 3 Blatch. 325, Fed. Cas. No. 14,833.) It is a well-settled rule of statutory construction that expired or repealed acts in pari materia with the act to be construed may be considered by the Court in seeking correct meaning of words and terms employed in enactment to be construed. (23 Am. & Eng. Ency. of Law, 315, and cases there collated. See, also, Reiche v. Smythe, 13 Wall. 162.) I am of opinion, therefore, that the "creosote" comprising the two importations under consideration, is not a "distilled oil" within the meaning of paragraph 60, but that, on the contrary, it is a "product of coal tar" within the meaning of paragraph 443, and as such is entitled to free entry, not being otherwise specially provided for in the act.

It is further contended by counsel for the Government that under the latter part of section 4 of the act under consideration, which provides that, "If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates," the "creosote" in question must be subject to the duty of 25 per cent ad valorem provided for in paragraph 60. It is assumed, of course, that the merchandise in question is both a "distilled oil" and a "product of coal tar," and that, therefore, the duty provided for "distilled oil," being the higher duty, should apply. The contention is untenable. In the first place, I am unable, as stated, to

find from the evidence that the "creosote" in question is a "distilled oil," within the meaning of paragraph 60. In the second place, I do not regard the provision applicable to this case, for the simple reason that it cannot be said, strictly speaking, that there are two rates of duty which can apply to the merchandise in question. If I am correct in holding that "creosote" is a "product of coal tar" within the meaning of paragraph 443, it then is not subject to any duty whatever, but is entitled to free entry. Under this condition of affairs, if the "creosote" be subject to duty at all, there is, obviously, but one rate of duty which is applicable. As was aptly remarked by the Court, in Matheson & Co. v. United States, 71 Fed. R. 394, 395, "As one (paragraph) imposes duty, and the other exempts from duty, it is obvious that Congress did not intend both provisions to apply to the same article."

Without discussing the questions any further, I am of opinion, both from the evidence and under the law, that the ruling of the Board of United States General Appraisers, relating to the two importations involved in these two petitions, was erroneous, and should be reversed; and it is so ordered.

[Endorsed]: Filed August 16th, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY, for a Review of the Decision of the United States General Appraisers, Relative to Classification of Certain Creosote Merchandise Imported by said Southern Pacific Company.	No. 12,247.

Bill of Exceptions.

Be it remembered, that on the 21st day of May, 1897, the said matter came on regularly to be heard in the United States Circuit Court, Ninth Circuit, in and for the Northern District of California, upon the petition and application of the above-named petitioner, appellee herein, the Southern Pacific Company, which said petition and application had been theretofore duly filed in said Court, praying for a review of the decision of the Board of United States General Appraisers theretofore made herein, sustaining the action of respondent and appellant herein, the Collector of the Customs for the Port of San Francisco in said Circuit, District and State, and upon the return to said Court of said Board of United States General Appraisers herein, and upon the testimony and evidence hereinafter set forth, taken before United States General Appraiser F. N. Shurtleff, Esq., as special referee, to whom the case above numbered and specified had been duly and regularly referred by said Court to take and return thereto such further evidence as might be offered by any party herein, which said return of Board of United States General Appraisers and said further ev-

idence, and all thereof, so returned as aforesaid, was made and taken at the times and in the manner hereinafter stated and is as follows:

The return of the Board of the United States General Appraisers herein, with the testimony taken by them, is found on pages 8–46 hereof, to which reference is hereby made, and the same is made a part of this bill of exceptions.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY, for a Review of the Decision of the United States General Appraisers, Relative to Classification of Certain Creosote Merchandise Imported by said Southern Pacific Company.

Be it remembered, that, pursuant to the order of reference of the Honorable Circuit Court of the United States, Ninth Circuit, Northern District of California, there appeared before me, F. N. Shurtleff, Esq., the referee appointed in said order, at Room 85, in the Appraisers' Building, corner of Washington and Sansome streets, San Francisco, California, on Thursday, the 28th day of January, 1897, at the hour of ten o'clock A. M., John D. Isaacs, Thomas Price, Harry East Miller, and W. M. Searby, witnesses on behalf of the petitioner, and C. A. Kern, a witness on behalf of the respondent, in the above entitled cause and matter; Frederick B. Lake, Esq., and John J. De Haven, Esq., appearing as counsel on behalf of the Southern Pacific Company, petitioner, and Samuel

Knight, Esq., assistant United States Attorney, appearing on behalf of the Collector of the Port of San Francisco, respondent; and the said witnesses, being severally duly sworn by me to tell the truth, the whole truth, and nothing but the truth, did testify as hereinafter set forth:

Thursday, January 28, 1897.

Mr. LAKE.—We have produced here certain samples of creosote. I believe the understanding between counsel for the respondent and ourselves was that the samples produced were virtually the same as the importation which is the subject of this inquiry.

Mr. KNIGHT.—We have obtained from Dr. Kern, the Government chemist, two samples which were taken from the importation at the time it was originally imported, and when he was called upon to examine it as the Government chemist. Those samples can be identified by Dr. Kern, if necessary.

Mr. LAKE.—The samples which we have here were taken from the same importation.

Mr. KNIGHT.—I suggest to you, Mr. Lake, that, as there might be some confusion, you examine your witnesses concerning these various samples, so that we will have in evidence just what the samples are.

Mr. LAKE.—Very well. I will call Mr. Isaacs and examine him briefly upon the question of the identification of these samples. Will you admit that this sample which I now present to you is a sample that was given by you to us as having been taken from the sample originally furnished the Government chemist upon the importation of the merchandise?

Mr. KNIGHT.—Yes, I will admit that.

Mr. LAKE.—We offer in evidence the sample referred to, and ask that it be marked "Petitioner's Exhibit A."

(The bottle containing the sample referred to and offered in evidence was here marked "Petitioner's Exhibit A.'

Mr. LAKE.—Here is another sample, which is at present marked "Sample Creosote. Center No. 2 Tank. November 26, 1896." Upon that I will ask Mr. Isaacs to testify.

JOHN D. ISAACS, a witness on behalf of the appellant and petitioner, being duly sworn, testified as follows:

Mr. LAKE.—Q. What is your occupation, Mr. Isaacs?

A. I am a civil engineer.

Q. In the employ of whom?

A. In the employ of the Southern Pacific Company.

Q. The petitioner and appellant in this proceeding?

A. Yes, sir, I suppose so.

Q. I show you a bottle with its contents, marked "Sample Creosote. Center No. 2 Tank. November 26, 1896," and I ask you where that sample came from, and how the substance came to be imported, and at what time it was imported.

A. Last November the Southern Pacific Company received a shipment of it by train.

Q. November, in what year?

A. November of 1896. The Southern Pacific Company received a shipment by train from New Orleans, consisting of a good many casks (I do not remember how many) of creosote, which was pumped into our storage tanks at Oakland. Those tanks were heated and stirred up, the contents mixed together, and samples were taken in the tanks from different points; one from a point one foot from the bottom, one from a point one foot from the top, and one from a point half way down in the tank, or in the center of it. This particular sample was taken from the center of No. 2 tank. It is the sample that was taken from half way down in the tank.

Q. I will ask you to look at "Petitioner's Exhibit A," and state whether or not it is the same substance as that in the bottle marked "Sample Creosote, Center No. 2 Tank. November 26, 1896," with reference to which I have just been interrogating you.

Mr. KNIGHT.—I object to that question, upon the ground that the witness has not shown himself qualified to testify as to the character of the substance. (To counsel for appellant.) Do you want to get at whether it was taken from the same place?

Mr. LAKE.—Whether it is from the same place and is the same substance.

Mr. KNIGHT.—I will admit it is from the same place.

Mr. LAKE.—And that it contains the same substance?

Mr. KNIGHT.—I have no doubt that it is the same substance.

Mr. LAKE.—I want to show that these two substances are identically the same, simply to identify the two.

Mr. KNIGHT.—Very well. I will withdraw the objection to the question. Our objections in this proceeding are simply noted, to be passed upon hereafter.

Mr. LAKE.—I will change the form of the question.

Q. Mr. Isaacs, are you familiar with the substance of this bottle marked "Petitioner's Exhibit A"?

A. Yes, sir.

Q. In what way are you familiar with it?

A. I have had charge of the Southern Pacific Company's creosote and wood-preserving plants ever since they were built.

Q. Have you had any experience in regard to that substance? A. Yes, sir.

Q. In what way?

A. I have used it and I have analyzed it.

Q. How long have you studied that subject?

A. Since the year 1889.

Q. Do you feel competent to state whether the substances in those two bottles are virtually identical, or not, from analyses made? A. I do.

Q. I am now referring to the substance contained in the bottle marked "Petitioner's Exhibit A," and the substance contained in the bottle marked "Sample creosote. Center No. 2 Tank. November 26, 1896." Are they virtually identical substances?

A. They are both creosotes, but one is a more fluid specimen than the other.

Q. But they are both creosotes, you say?

A. They are both creosotes.

Q. I now show you a bottle marked "Creosote Sample. Center No. 1 Tank. November 26, 1896," and also marked "J. H. McKeen," and I ask you what that is.

A. That is virtually the same substance as "Petitioner's Exhibit A." I have not analyzed it, but it looks like it.

Mr. De HAVEN.—Can we not agree that all of these substances were taken from the substance which forms the subject matter of this contest?

Mr. KNIGHT.—Certainly, I will agree to that. Let me see, though. There may be a little question here as to the condition of the substance at the time the various samples were taken from it. That is: As I understand it, this first sample to which the attention of the witness was called was taken from the product of several tanks.

Q. Is that so, Mr. Isaacs?

A. It was taken from a mixture of all of the carloads of the same invoice.

Q. Of the same invoice, you say?

A. Yes, sir.

Q. And the sample was taken from the center of the

tank after it had been heated and stirred up?

A. That sample was taken from the center of the tank after it had been heated and stirred up, yes, sir.

Q. And there was no other invoice entered into this, except the invoice that we now have under consideration? A. There was not no, sir.

Q. Then, as I understand it, the substance contained in this second bottle which has been shown you—it has not been marked; perhaps we had better consider it as "Exhibit B," and then when it is offered it can be offered under that letter—was taken from the same invoice as the sample "Petitioner's Exhibit A"? A. Yes, sir.

Q. Now, let us take this third bottle, which for the moment we will call bottle "C," and which may be offered in evidence under that letter, if it is offered. I understand you that that was taken from the same invoice?

A. I do not know that, Mr. Knight; I merely ordered that sent. I myself did not see that particular sample taken.

Q. You ordered that taken, did you?

A. Yes, sir.

Q. From what did you order it taken?

A. I ordered a duplicate sample of bottle "B" sent.

Q. You ordered a duplicate sample of bottle "B" sent to Mr. Lake? A. Yes, sir.

Q. And this is the bottle that was sent, is it?

A. Mr. Lake received it. I do not know myself.

Q. So far as your order was concerned, this sample is supposed to be the same as the sample contained in bottle "B"?

A. Yes, sir, that is supposed to be the same

Q. Except that you yourself did not take the sample?

A. That is correct.

Mr. KNIGHT.—That is all.

Mr. LAKE.—Q. Do I understand, Mr. Isaacs, that you ordered the sample bottle "C" to be taken from the same part of the tank as the sample contained in bottle "B"?

A. I ordered an average sample of the same invoice as bottle "B" sent to Mr. Lake.

Q. From what part of the tank would they take such average sample?

A. They should take it from the center of the tank.

Q. Just as the sample in bottle "B" was taken?

A. Yes, sir, after stirring the contents of the tank.

Q. After going through the same operation of heating, and stirring?

A. Yes, sir. But may I say that I do not think that was done with that sample, although it should have been done according to the directions.

Q. What reason have you for saying that?

A. I do not think it was heated and stirred. I think it was simply taken from near the top, or not lower than the middle of the tank, without being either heated or stirred.

Mr. LAKE.—Will you give us the admission now, Mr. Knight?

Mr. KNIGHT.—Yes. I will give you admission that all of these various samples, contained respectively in "Petitioner's Exhibit A" and bottle "B" and bottle "C," together with the samples that were returned from the Board of General Appraisers, the official samples, and the two samples produced from the office of the Government chemist, are taken from the invoices which are the subject of this controversy.

Mr. LAKE.—Very well. We will take that admission. And we now offer in evidence the bottle which has been

referred to in the examination of witness as bottle "B," and ask that the same be marked "Petitioner's Exhibit B"; and also offer in evidence the contents of the bottle which has been referred to in the examination of the witness as bottle "C," and ask that the same be marked "Petitioner's Exhibit C."

Mr. KNIGHT.—And to facilitate the examination, we will offer in evidence at this time, with the consent of counsel, the two samples which have been produced from the office of the Government chemist here, Dr. Kern, and ask that they be marked respectively, "Respondent's Exhibit 1" and "Respondent's Exhibit 2."

(The bottles containing the samples so offered in evidence on the part of the petitioner and on the part of the respondent were here marked respectively as asked for by counsel.)

THOMAS PRICE, called for the appellant and petitioner, after being duly sworn, testified as follows:

Mr. LAKE.—Q. What is your profession?

A. Analytical chemist.

Mr. KNIGHT.—I will admit the high standing and character of Professor Price as a chemist.

Mr. LAKE.—Q. How long have you been such analytical chemist.

A. All my lifetime.

Q. I will show you a bottle, marked "Petitioner's Exhibit C," and its contents, and ask you to state if you made an analysis of that substance.

A. I made an analysis of that substance, yes, sir.

Q. Do you know what an expressed oil is, Professor?

A. Yes, sir. An expressed oil is one that is pressed out of material that is of an oily nature, like the cocoanut and palm.

Q. Are these oils known by that name, as "expressed" oils?

A. Yes, sir.

Q. Do you, as a chemist, know substances known as rendered oils?

A. Yes, sir. Those are oils that are produced by heating, such as lard oil, by which a certain soluble material is separated from the substance. The oil in that case is separated by heat.

Q. Do you know substances known as essential oils?

A. Yes, sir.

Q. What are they?

A. Essential oils are of two kinds. With some essential oils, as, for instance, the various perfumes, attar of roses, and such as that, the oil is simply separated by agitating it in water or in alcohol. The resultant fluid is an essential oil. Then again there are essential oils that are called distilled oils, made by subjecting the same essential oils, extracted in the way mentioned or directly from the material itself, to the process of distillation.

Q. Then you know of substances known as distilled oils also, do you?

A. There are a large number of oils produced by the process of distillation.

Q. But there are substances known as distilled oils, are there not?

A. No, sir, I do not know of substances known as distilled oils as such, except oils prepared as I am telling you.

Q. Prepared from essential oils?

A. Prepared from essential oils, yes, by the process of distillation.

Q. Is this substance which you have analyzed, and

which is contained in the bottle marked "Petitioner's Exhibit C," known as a distilled oil in chemistry, to the trade?

A. No, sir.

Q. What is that substance, Professor?

A. That is one of the products of coal tar, produced by the process of distillation, fractional distillation.

Q. Could you name some of the products of coal tar?

A. Coal tar is one of the products of the distillation of coal in the manufacture of common lighting gas. The first product of distillation is a tarry material containing more or less water. The watery solution contains the ammonia. This is allowed to settle, and the tarry material is subjected to the process of fractional distillation. The first products of distillation which come over are light oils, benzole and naphtha. The second product, on pushing the distillation still farther and increasing the temperature, would be carbolic acid, and naphthalene to a certain extent. The third product in the process of distillation, after further increasing the temperature, would be what is called creosote, which is a complex compound. There then would remain a semi-liquid mass in the retort. If the distillation is pushed still further, there is produced what is called anthracene. There then remains in the retort, pitch. Occasionally that pitch is subjected to a further distillation, and a coke remains. These, roughly speaking, are the four or five products of coal tar when subjected to the process of fractional distillation, or destructive distillation, as it is sometimes called.

Q. You used the expression "light oils," Professor, when you started off with benzole and naphtha.

A. Yes, sir.

Q. Is it not true that when you apply heat to coal tar

that there is not a single product that comes over from the retort except coke, that chemists do not call, by way of description, oil?

A. Yes, sir, they are all called oils.

Q. They call them all oils?

A. Yes, sir, they call them all oils.

Q. What kind of a substance is naphthalene?

A. Naphthalene is a white, solid substance.

Q. When it cools, it becomes white?

A. It separates out from the oil upon cooling.

Mr. KNIGHT.—Q. When you speak of its being a "solid substance," I suppose you mean solid at ordinary temperature?

A. Solid at ordinary temperatures, yes, and when free from any of these other mixtures, like carbolic acid.

Mr. LAKE.—Q. Benzole will hold naphthalene?

A. Benzole will hold naphthalene in solution.

Q. Carbolic acid is an acid, is it not?

A. Yes, sir.

Q. That, also, is called an oil, is it not?

A. Yes, sir, it is called carbolic oil.

Q. You also call benzole an oil, do you not?

A. Yes, sir, a light oil.

Q. And naphtha you also call an oil?

A. Yes, sir.

Q. And when crude anthracene crystals come over, on the application of heat up to 270 degrees Fahrenheit, you call that an oil also?

A. Yes, sir.

Q. You also call sulphuric acid an oil?

A. Yes, sir. It is sometimes called oil of vitriol.

Q. Are you speaking of the term as used chemically or commercially?

A. I am speaking commercially. Coal tar compounds

are all called oils. When describing their manufacture, we simply state that when it is heated up to a certain temperature certain light oils will come over from the retort; and as the temperature is increased the next light oil will pass over. And so on in the process, by increasing the temperature, until the heavier or "dead" oil passes over, which is the creosote of commerce.

Q. With which you are familiar?

A. Yes, sir.

Q. Is the creosote of commerce known as a distilled oil, or as a product of coal tar?

A. Well, it is called creosote oil, and it is a product of the destructive distillation of coal tar.

Q. But is it known in commerce as a distilled oil?

A. No, sir, it is not.

Q. How would you, as a chemist, describe it?

A. I would describe creosote as one of the products of the destructive distillation of coal tar, and that it is itself a very complicated compound, from which you can separate innumerable substances by further treatment with alkalies and acids, and subjecting it to fractional distillation. It essentially consists, of course, of the hydrocarbon oils and carbolic acid.

Q. And anthracene?

A. And anthracene also, yes, sir.

Q. When you say the hydrocarbon oils, you include anthracene and carbolic acid?

A. Yes, sir. The composition of creosote is very complicated. It contains naphthalene, carbolic, and cresylic acid, crinoline, and various other complicated compounds.

Q. This creosote of which you are now speaking is the same substance that is contained in this bottle, "Petitioner's Exhibit C"? A. Yes, sir.

Q. Have you made an analysis of the substance in that bottle, "Petitioner's Exhibit C"?

A. Yes, sir. That comports with the composition of creosote. I may say, of course, that there are scarcely any two samples of creosote that are exactly the same, as it depends much upon the character of the coal from which the creosote is manufactured. For instance, the creosote of nearly every district will vary in composition from that of other districts; and much of the creosote of commerce to-day is not obtained really from the coal tar produced in manufacturing gas, but is the product that escapes from the blast furnace in the smelting of iron.

Mr. KNIGHT.—Q. That is not made here so much as in England?

A. That is made more in England, yes. I speak of that because England is really the great market for creosote

Mr. LAKE.—Q. That is not obtained by distillation at all?

A. Yes, sir. It is tarry compound which is then subjected to distillation. That is the reason I tell you there may be a difference in the composition of creosote itself, depending entirely upon the method of its production and from what product it has been produced.

Q. As a chemist, Professor, how would you describe the substance in that bottle, "Petitioner's Exhibit C," as a distilled oil or as a product of coal tar?

A. I would describe that as one of the products of the destructive distillation of coal tar.

Cross-Examination.

Mr. KNIGHT.—Q. Professor Price, this term "distilled oil," or the term "essential oil," or the term "ex-

pressed oil," or the term "rendered oil"—those terms are not commercial terms, are they? They rather express the manner in which the various products are produced, do they not?

A. Yes, sir.

Q. So far as your experience goes, you do not buy or sell an oil in the market as an expressed oil or a rendered oil; you buy or sell it with reference to the particular source from which it is derived, or perhaps from the particular oil?

A. Certainly.

Q. That is to say, you would require a person who spoke to you of a rendered oil or an essential oil or a distilled oil to specify what kind of an oil he wanted, if you were in that business?

A. I am of course dealing in oils for my purposes, making analyses of them. I would simply go to a place and say, "Give me some lard oil," or "cocoanut oil," or "coal oil," or anything like that. Those are the terms I would use, and they are the ordinary terms used when speaking of oils in general terms.

Q. And among the known distilled oils is the oil in question, is it not?

A. It is a product of the destructive distillation of coal tar.

Q. If a person should come into your place of business and ask for a preparation or product of coal tar, you would require him to specify what form of product he wanted, would you not?

A. Yes, sir, certainly.

Q. You would want to know what distillate he wanted?

A. I would want to know what product of coal tar

he wanted—the light oils, or carbolic, or cresylic acid, or creosote—something of that kind.

Q. In other words, the term "preparation or product of coal tar" is more an expression used to denominate what a substance is than a commercial term? It is more to express what the substance actually is, or from what it is made, than a commercial designation for any one substance?

A. Certainly. A man who buys an oil is not always informed of the method of preparation, nor is it necessary that he should be. He becomes acquainted with a certain kind of oil, say, and without knowing anything about the technical details of its manufacture, he asks for that oil.

Q. As a matter of fact, Professor, neither of the terms "distilled oil" or "product or preparation of coal tar" is a commercial term, is it?

A. No, sir. This I would call creosote, if I wanted to buy it; the substance in this bottle, "Petitioner's Exhibit C," I would not call an oil; I would say, "I want creosote."

Q. You would say if you want to purchase some of a substance similiar to that contained in this bottle, "Petitioner's Exhibit C," "I want creosote"?

A. Yes, sir, I would say "I want creosote."

Q. But you would know, as a matter of fact, that it is not only an oil produced by distillation from coal tar, but you would also know that it is a product from coal tar?

A. Yes, sir.

Q. Regardless of its commercial nomenclature?

A. Yes, sir. I would not ask for creosote oil; I would ask for "creosote."

Q. Professor, does your examination of that oil lead you to testify—that is to say, you did make an examination by distillation of this oil in question, did you not?

A. My examination was made in part by distillation and in part by freezing.

Q. Did you treat it with acids at all?

A. Yes, sir. I treated it with acids, in order to arrive at the percentage of tar acids there. I think the best way to get at this matter is to read the analysis which I made of it. Then you will be able to understand me, and I you. I found the compound to have a specific gravity of 1.044.

Q. That is, it is forty-four hundredths heavier than water?

A. Forty-four thousandths.

Q. I should say forty-four thousandths.

A. Yes, sir. I found that the material is fluid at 78 degrees Fahrenheit.

Q. What would that be Celsius, do you know?

A. I have not my tables here. (The witness is shown a paper) It would be 26 degrees Celsius. Its composition I found to be as follows: Water, none. Distillate from 100 degrees to 200 degrees Fahrenheit, none.

Q. This is all in Fahrenheit degrees?

A. Yes, sir, Fahrenheit. I use Fahrenheit right through here in my analysis. Then the distillate between 100 degrees and 200 degrees Fahrenheit was none.

Q. Nothing came over between those two figures?

A. There was no distillate between 100 and 200 degrees Fahrenheit.

Mr. LAKE.—Q. What would that be, if there had been a distillate?

A. Benzole and naphtha, probably. It would proba-

bly be what you would call dissolved naphtha. Then between 200 degrees and 400 degrees Fahrenheit, I obtained 5.20 cubic centimeters. I took 100 cubic centimeters for the analysis, and between 200 and 400 degrees Fahrenheit, I got 5.20 cubic centimeters of distillate.

Q. What substance was that?

A. That is an oily compound; heavy oils.

Mr. KNIGHT.—Q. You got 5.20 cubic centimeters of heavy oil between 200 and 400 degrees Fahrenheit?

A. Yes, sir. Between 400 and 600 degrees Fahrenheit, I obtained 74.80 cubic centimeters.

Q. Of what?

A. Of a still heavier oil, which, in fact, solidified on cooling down to 40 degrees. There then remained a residue above the temperature of 600 degrees Fahrenheit of 20 cubic centimeters.

Q. That was pitch?

A. Pitch yes; but containing some anthracene. A further examination was made, and the material was found to contain tar acids.

Q. What material was that?

A. (Continuing.) That is, carbolic and cresylic acids.

Q. Let me interrupt you a moment, Professor. I am trying to get at what material it was of which you state you made a further examination.

A. I should have said that in this distillation between 200 and 400 degrees Fahrenheit where I obtained 5.20 cubic centimeters, of heavy oil, those heavy oils held other materials in solution, as I will explain later on. I then subjected the oil to still further heat, between 400 and 600 degrees Fahrenheit, and produced a heavy, dense oil, to the amount of 74.80 cubic centimeters. This oily compound held in solution tar acids, naphthalene, and anthracene, and other compounds. The tar acids

amounted to 8.75 per cent, and naphthalene to the extent of 9.30 per cent. That is, 8.75 per cent of the whole mass was tar acids, and 9.30 per cent was naphthalene.

Mr. LAKE.—What was the percentage of tar acids, Professor? A. 8.75 per cent.

Mr. KNIGHT.—Q. Now, let me see that I understand you. After you had subjected this substance which was the subject of your analysis, to a distillation with a temperature of from 200 to 400 degrees Fahrenheit, you obtained 5.20 cubic centimeters of certain heavy oils, mixed in solution with other matters?

A. Yes, sir.

Q. You took that 5.20 cubic centimeters of heavy oils and subjected it to a heat of from 400 to 600 degrees Fahrenheit?

A. No, sir. The remaining 94.80 cubic centimeters was what was subjected to the heat of 400 to 600 degrees Fahrenheit. I first took 100 cubic centimeters of the substance for analysis, and obtained a distillate of 5.20 cubic centimeters between 200 and 400 degrees Fahrenheit. There then remained 94.80 cubic centimeters, which was subjected to a heat of 400 to 600 degrees Fahrenheit.

Q. Then it was the remainder after the 5.20 cubic centimeters that you subjected to that heat?

A. Yes, sir, to a fractional distillation.

Q. Then in making the statement, you were practically repeating what you told us before?

A. Yes, sir.

Q. I want to know, then, whether or not you subjected that solution, or any part of that solution, or any part of that product, to another treatment than the treatment of fractional distillation of which you have spoken? Did you subject it to a treatment with acids?

A. The distillate was subjected, of course, to the

action of caustic soda, and finally to the action of acids, in order to be able to arrive at what quantity of tar acid the oils had carried over. One hundred grammes of the original substance was taken and kept for about fifteen minutes at a temperature of 40 degrees Fahrenheit. This cooled the mixture so that the naphthalene separated from it. Filtering that in a funnel surrounded with ice, so as to keep the temperature down, there finally remained an oil mixed with the naphthalene, which remnant was pressed, and the equivalent 9.3 per cent naphthalene was separated out.

Q. These were all fractional distillations, were they not, Professor?

A. All fractional distillations, except for the tar acids and naphthalene.

Q. You found, I suppose, that the chief constituents were basic oils, parvoline, collidine, coridine, and leucoline, did you not? Are not those the basic oils largely contained in these creosotes?

A. I did not go into the details of the exact composition of the creosote. I simply subjected it to such an analysis as was necessary in order to determine its adaptability for creosoting purposes. I did not go into details of making a scientific analysis and a separation of the hundreds of materials into which the substance may be separated.

Q. To do that, you would have had to subject it to further treatment with acids, I suppose?

A. Not only with acids, but I would have had to resort to redistillation and treatment by chemicals of different kinds.

Q. Crude phenol is carbolic acid, is it not?

A. Yes, sir.

Q. That is simply another name for it?

A. Yes, sir. It is called phenic acid, too.

Q. Phenic acid is carbolic acid?

A. Yes, sir. And the tar acids may have more cresylic acid one time and more carbolic acid at another time, depending upon the character of the stock.

Q. To what use is the substance in question put on this coast, Professor, so far as you know?

A. I only know of its being put to use for creosoting purposes.

Q. That is, you mean for the purpose of applying to piles to keep the teredo from injuring them?

A. Well, yes, and I believe they are largely used (I do not know whether they are here or not) for sleepers.

Q. Sleepers on railroad tracks?

A. Yes, sir, for preserving the sleepers under the rails, and to prevent decomposition. I do not know of any other use to which they are put here.

Q. Do you know whether or not this substance is used at all in mixing paint.

A. No, sir, I do not. I cannot see what purpose it would serve in paint, from a chemical point of view.

Q. The lighter oils, the first substances coming over from the fractional distillation of which you speak, are used in paints, are they not?

A. Yes, sir, benzole is used for that purpose.

Q. But not the oils of the specific gravity of the substance in question? A. No, sir.

Q. That is too heavy, I suppose?

A. The object of using these lighter oils, like benzole and benzine and naphtha, is simply that they will evaporate and leave a hard substance behind after evaporation.

Q. As I understand you, the coal tar itself is a distilled product from coal? A. Yes, sir.

Q. Are you able to tell, from the examination that you have made of the substance in question, from what kind of coal that creosote is produced? It is produced I suppose, from a bituminous coal in the first place?

A. Yes, sir. Only bituminous coals produce it.

Q. Are you able to tell what kind of coal that is produced from other than that it is a bituminous coal?

A. No, sir.

Q. It does make a difference in the creosote from what coal it is produced does it not?

A. Yes, sir, there is a difference in composition, according to the coal from which it is produced; for instance, to give you some idea of it, there is a material difference even between the creosote produced from the gas works of London and that produced from the gas works of Manchester, and those cities are near neighbors, or would be so considered here.

Q. Then there is a difference between the blast furnace coal tar and that produced from gas, too, is there not?

A. Yes, sir. There is less carbolic acid in that from the blast furnaces.

Q. There are other products of coal tar besides distilled oil, are there not, Professor?

A. Yes, sir.

Q. What other products (products or educts; I use the term in a general way) are there of this coal tar, Professor?

A. I understand your meaning. There are a great many others. For instance, nearly all of the coloring materials that are now in use are derived from coal tar.

Q. But they are not distilled oils, are they?

A. No, sir. They are separated from some of these products, like from this creosote material.

Q. That is to say, they are separated by acids?

A. They are separated by acids and by alkalies, depending entirely upon what it is—by regular chemical operation.

Q. As a matter of fact, Professor, there are hundreds and hundreds of products which are derived from coal tar, are there not?

A. Yes, sir

Q. The products of coal tar are almost innumerable, are they not?

A. Yes, sir

Q. And a great many of those products are not what would be ordinarily known as distilled oil?

A. No, sir, they would not. They have been obtained however, from a product that was once distilled. For instance, you take sul-phenol, which I sometimes take, and phenacetin—all of those are compounds of coal tar.

Q. The coal tar is originally distilled, in order to get the substance which the phenace tin or these various other products are produced from?

A. Yes, sir

Q. Phenacetin is in the form of a powder, is it not?

A. Yes, sir. For instance, in order that we may be thoroughly understood, I will say this: If one takes coal tar, which is one of the by-products in the manufacture of coal gas, and breaks it up roughly, he will have the four main products that I have mentioned, or four divisions.

Q. That is to say, there are four main divisions?

A. Yes, sir. Then you take each one of those main divisions, and it can in turn be broken up, and from it innumerable compounds produced. I suppose the compounds of coal tar can be reckoned up into the thousands at the present time. They are simply the result of work-

ing further along one of those four lines, along the line of the first, second, third, or fourth main product.

Q. That is, you take the various products derived from the first, second, third, and fourth fractional distillations, we will say.

A. Yes, sir

Q. And you would, by working those products further, for instance by acids, or by other treatment, get all those innumerable substances as a result?

A. Yes, sir.

Q. Some of them would be derived from the product of the first distillation?

A. Yes, sir

Q. And some would be derived from the product of the second, and some from the third, and some from the fourth distillation?

A. Yes, sir, making them into other compounds.

Q. As I understand it, in obtaining that product, the product which you have specially referred to, which is contained in this bottle, "Exhibit C"—I suppose in general the same testimony may refer to the substances in all these bottles, with some qualifications?

A. There would be no difference at all to speak of. I think there is a slight difference between the contents of this bottle, and that of the others. As Mr. Isaacs says, probably in this cold weather, in a sample taken, one would get less naphthalene, probably, than there is in the average. Otherwise it is the same.

Q. It will only differ as to the relative quality of naphthalene?

A. Relatively, sir. Otherwise it is identical.

Q. The substance contained in the bottle, "Petitioner's Exhibit C," I understand has not been subjected, as

far as you know, to any treatment by acids. It has simply been distilled, has it?

A. Yes, sir, it has simply been treated by distillation.

Q. Distillation pure and simple?

A. Pure and simple, yes, sir.

Q. To what degree of heat would you say the substance in its present form has been subjected, in the process of distillation? How many degrees Fahrenheit? I refer now to the substance in "Petitioner's Exhibit C."

A. It must have been over 400 degrees, say from 400 up to 600 degrees Fahrenheit, because there is a residue of 20 per cent left after heating it up to 600 degrees, as I found in the distillation which I made of it.

Q. What limit of temperature would you say that substance had been subjected to to present it in its present form?

A. I should say that that had been subjected to a temperature of not over somewhere from 800 to 900 Fahrenheit.

Q. You would say that that is the result of the distillation of coal tar up to about that heat?

A. Yes, sir.

Q. And that that substance has passed over?

A. That substance has passed over, under those conditions.

Q. Dead oil and heavy oil are the same thing, are they not, Professor?

A. Yes, sir.

Q. Do you know whether what are called dead oils or heavy oils are of a greater specific gravity than water?

A. Yes, sir. I suppose those names are simply factory names. A man simply sees that some of the oils float on water, and those he calls lighter oils, and he sees

that there are others that will not float upon the water, which sink down in the water, and those he calls dead oils or heavy oils. Those are simply terms used by workmen to designate the oils.

Redirect Examination.

Mr. LAKE.—Q. Professor Price, I want to ask you this question, in order to get this matter entirely straightened out. I want to be corrected if I am not right. I understood you to say that you would not call this substance an oil at all, that you would call it a product of coal tar. Is that correct?

Mr. KNIGHT.—I object to the question upon the ground, first, that it is ambiguous. The witness should first state whether he is speaking chemically or in the ordinary commercial sense before he answers the question.

Mr. LAKE.—I am speaking chemically now. That is what I intended by the question.

A. No, sir, I would not call that an oil.

Q. I also understood you to say that this substance was not known as a distilled oil, and that you would not so designate it.

A. It is not known as a distilled oil, according to my understanding of a distilled oil.

Q. You simply call it creosote?

A. I would ask for creosote if I wanted that article.

Q. You were also speaking about crude phenols, and you stated that they were carbolic acid?

A. Yes, sir.

Q. Is it not true (I think you stated it before) that that also is called an oil?

A. Yes, sir.

Q. And is obtained by distillation?

A. Yes, sir, it is obtained by distillation.

Q. Is naphthalene called an oil, and is it obtained by distillation?

A. It is obtained by distillation, and I believe it is sometimes also called an oil.

Q. Is not naphtha called one of the lighter oils?

A. Yes, sir, it is called one of the lighter oils.

Q. And is not benzole called one of the lighter oils?

A. Yes, sir.

Q. Is there a single substance that is not known by chemists as an oil, which is produced from coal tar by distillation, from the time they begin to apply heat to the coal tar, except coke?

A. In the subdivisions which I have given, they are all called oils.

Q. Is it not a fact that naphthalene is obtained and can be obtained in a more or less pure state by the application of heat and by distillation?

A. I could not answer that question. I do not know why it should not.

Q. Let me look at your analysis, Professor. I do not think I understand this exactly. I ask you to state for me, please, how much naphthalene there is in the substance, according to your analysis?

A. This material as it came to me contained 9.3 per cent of naphthalene.

Q. That is, with 100 per cent to the whole?

A. Certainly.

Q. And how much tar acids did the whole substance contain?

A. The tar acids were 8.75 per cent of the whole substance.

Q. And how much pitch and anthracene were there in there?

A. The pitch is the residuum remaining. That was 20 per cent.

Q. The residuum was 20 per cent, and there were none of the lighter oils in the substance, were there?

A. No, sir. There is no distillate whatever below 200 degrees. The distillate between 200 degrees and 400 degrees is 5.2.

Mr. KNIGHT.—Q. 5.2 cubic centimeters?

A. 5.2 cubic centimeters, or 5.2 per cent. It is the same, as I took 100 cubic centimeters of the substance for the fractional distillation.

Mr. LAKE.—Q. The distillate between 200 degrees and 400 degrees, as I understand it, would include naphthalene and carbolic acid, would it not?

A. Yes, sir and it would contain a mixture of everything. Maybe there would be a little more carbolic acid in that than in any other portion.

Q. So this is just splitting off the various products between the different degrees of heat as you have given them?

A. Yes, sir, subjecting the substance to fractional distillation at increasing degrees of heat.

Q. So, virtually, each one of those different what I may call segregations of the substance contain more or less of the segregations which went before and the products which are to follow by further distillation. Is that not true?

A. Certainly.

Q. You simply begin to distill, and distill up to a certain temperature, and cut it off there and mark how much that is, what the percentage is. That is the way you did in this case, is it?

A. Yes, sir.

Q. Then you went on distilling, and you cut it off

again at a different degree of temperature, and marked how much distillate there was then?

A. Yes, sir.

Q. And then when you had finally reached a certain temperature, you stopped there?

A. Yes, sir.

Q. That is correct?

A. That is correct.

Q. So the distillate coming over between 200 degrees and 400 degrees Fahrenheit contains some of the same substance as the 74.80 cubic centimeters that came over between the 400 and 600 degrees Fahrenheit?

A. Yes, sir.

Q. And the distillate which came over between 400 degrees and 600 Fahrenheit, the 74.80 cubic centimeters, contained some of the same substances or material as the 20 per cent residuum after a temperature of 600 degrees Fahrenheit had been reached?

A. Yes, sir.

Q. Each contained more or less of the other?

A. More or less, yes, sir.

Q. And the residue was 20 per cent?

A. 20 per cent, yes, sir.

Q. So this analysis is simply splitting off the different products at different degrees of heat?

A. As I said before, this is an analysis simply carried to the extent necessary in order to determine the commercial value of creosote.

Q. For the purposes of trade?

A. For the purposes of trade.

Mr. KNIGHT.—Q. You followed the common form of distillation in this case, did you not?

A. Yes, sir.

Mr. LAKE.—Q. Is there any difference, virtually,

Professor, between any of these so-called oils, these products which chemists call oils, the light oils, the middle oils, the heavy oils, and the anthracene oils in their component parts? Do they differ at all in substance? Are they not all pure hydrocarbon?

A. There is, of course, some nitrogen.

Q. They are all similar in that respect, are they not? All pure hydrocarbon?

A. No, sir. Benzole contains some nitrogen, and the heavy oils have nitrogen, especially the naphthalene. And then you have the carbolic acid.

Recross-Examination.

Mr. KNIGHT.—Q. They differ, however, in their constituent elements?

A. In the percentage, yes.

Q. Professor, let me ask you a question which may prhaps be a little difficult to answer. What is an oil, as the term is known to chemists?

A. Oil is anything that is of an oily nature, slippery between the fingers. There is no dictionary that will tell you exactly what an oil is.

Q. What do you understand by the term "basic oil," in referring to the distillations of the substance in question, of coal tar?

A. All substances in nature are either basic or acid substances. Basic substances are those that are base, and that will combine with an acid and form a salt, a new compound.

Q. This substance, then, as I understand you, does contain naphthalene and its derivatives, along with the basic oils? A. Yes, sir.

Q. And the bitumens that are dissolved?

A. Yes, sir.

Q. Together with crude phenols or tar acids of the cresylic and carbolic acid types? A. Yes, sir.

Mr. LAKE.—We offer in evidence the analysis of Professor Price, to which he has testified, to be marked "Petitioner's Exhibit D."

(Marked "Petitioner's Exhibit D.")

Mr. KNIGHT.—Before you put on another witness, I would like to recall Mr. Isaacs for a few further questions as to the use of this substance.

JOHN D. ISAACS recalled for further cross-examination.

Mr. KNIGHT.—Q. Mr. Isaacs, will you state to what use the subject of this investigation is put?

A. It is used for the preservation of timber.

Q. That is, it is applied to piles, is it not?

A. Piles, telegraph poles, railroad ties, girders, stringers, planking—all kinds of lumber, in fact, to preserve it from rot or attack of insects, or from external or internal decay.

Q. Will you state whether or not it is applied directly, or is applied to this timber after the moisture has been absorbed, or rather, extracted? How is this substance applied to the timber? Is not the moisture first taken from the timber as far as possible, before this substance is applied to it? A. Yes, sir.

Q. How is that done? By creating a vacuum?

A. There are two ways of doing it. Under one system, the timber is put into closed retorts, and is subjected to the action of superheated steam, until the moisture is fairly well evaporated or turned into steam. The vacuum pump is then put to work, and the moist air, or mixed air and steam, is taken out and condensed. If that does not sufficiently dry the timber, the process is repeated. It is sometimes repeated several times, always until the tim-

ber is thoroughly dried. It is necessary, for the complete protection of timber, that it should be not only thoroughly dry, but should be subjected to a sufficient heat, long enough continued, to destroy any germs of decay which are or may be in the timber at the time of treatment.

Q. In that way, also, the creosote itself more thoroughly impregnates the timber, does it not?

A. Yes, sir; that is one object. The other way by which timber is treated is this: It is immersed in a bath of antiseptic fluid, and the heat applied in steam coils to the fluid itself, forming a medium (that is a better way) by which the heat is conveyed from the steam to the timber. As the tie becomes dry, the moisture in the wood, the sap, exudes out from the pores and ends of the timber. Then this is allowed to escape without an air pump, through a condenser, and the amount of vaporization measured in the condenser for the purpose of telling how dry the timber has become. The next process is the process of forcing the creosote in the same retort into the timber sufficiently far to permeate it.

Mr. KNIGHT.—I do not want to take up too much time, but I merely wanted to get at the matter of the application of the substance in controversy.

HARRY EAST MILLER, called for the appellant and petitioner, after being duly sworn, testified as follows:

Mr. LAKE.—Q. What is your profession, Mr. Miller?

A. Consulting and analytical chemist.

Q. I will show you "Petitioner's Exhibit D," and also the bottle marked "Petitioner's Exhibit C."

A. May I just read this over?

Q. Certainly. I will ask you if you are familiar with that substance?

A. (After examination and reading exhibit) I am.

Q. How long have you been a practicing analytical chemist? A. About four years.

Q. From where did you graduate?

A. I graduated from the University of California, and then I took the degree of Doctor of Philosophy at the University of Strasburg, Germany.

Q. Are you familiar with this substance?

A. I am, sir.

Q. What is it?

A. From the analysis—if that is the analysis of the substance, the paper "Petitioner's Exhibit D"—I would say that it is that fraction of distillate of coal tar which is known as creosote.

Q. Is that known as a distilled oil, Mr. Miller?

A. No, sir, it is not known as a distilled oil.

Mr. KNIGHT.—Commercially or chemically?

Mr. LAKE.—Q. Is it commercially or chemically known as a distilled oil?

A. No, sir, it is not known as a distilled oil.

Q. Do you know what an expressed oil is?

A. I do.

Q. Is the substance contained in that bottle, "Petitioner's Exhibit C," an expressed oil?

A. No, sir, that is not an expressed oil.

Q. Do you know what a rendered oil is?

A. I do.

Q. Is that substance a rendered oil?

A. No, sir, it is not a rendered oil.

Q. Do you know what an essential oil is?

A. I do.

Q. Is the substance contained in "Petitioner's Exhibit C" an essential oil?

A. No, sir, that is not an essential oil.

Q. Would you, as a chemist, describe that substance as a product of coal tar, or as a distilled oil?

A. I will say that it is creosote, or the product of coal tar— one of the fractions distilled from coal tar.

Q. Is there any difference between that substance and the other distillates from coal tar? I mean now with reference to its being a hydrocarbon.

A. I would like to answer that question in perhaps a little different way, by saying that in the fractional distillation of coal tar where the receiver is changed and the different products are separated by the temperature, there is no single fraction which does not to some extent contain portions of the other fractions. It is not an exact operation, especially when it is only treated once. Each fraction of the whole distillation would contain portions of every other fraction, though perhaps only a trace.

Q. Is it not true that when heat is applied to coal tar, the first distillate that comes over in the retort is benzole and naphtha?

A. Benzole and carbolic acid and naphthalene and a thousand and one different products designated generally by those terms.

Q. Those are light oils, are they not?

A. They are called light oils, yes, sir.

Q. What are known as the middle oils?

A. The middle oils are those that contain the carbolic acid proper, and also some naphthalene.

Q. And then follow what are known as heavy oils?

A. Yes, sir, what are known as heavy oils or dead oils.

Q. And then comes the anthracene oil?

A. Then comes what is known as the anthracene fraction, yes.

Q. And then there is pitch?

A. Then there is pitch, yes.

Q. Is it not true that when you apply heat to coal tar, there is not a single product, except pitch, that you obtain which is not known as an oil?

A. I would like to modify that. In a crude state, there is not a single product which, if you called one an oil, could not be applied as a term to every other product, with the exception of the residuum, pitch—with perhaps the exception of the very first, when water comes over, and that you could not call an oil.

Q. Is there not water in the benzole when it first comes over? A. Yes, sir, a trifle.

Q. In the crude state? A. Yes, sir.

Q. Then you would call that an oil, would you not?

A. Yes, sir, the whole product you would call oil.

Mr. KNIGHT.—Q. That is, the product which comes over?

A. Yes, sir, the water is only a very small percentage.

Mr. LAKE.—Q. Would you, as an analytical chemist, familiar with this substance, describe it as a product of coal tar or as a distilled oil?

A. I would say it is creosote, a product of coal tar.

Q. That is the way you would describe it?

A. Yes, sir, that is the way I would describe it.

Q. Is it known to the trade as a distilled oil? Is it known as a distilled oil?

A. No, sir, it is not known as a distilled oil.

Cross-Examination.

Mr. KNIGHT.—Q. As a matter of fact, it is a distilled oil?

A. In what way, Mr. Knight?

Q. Practically; that is, looking at the process through which it has been put. It is an oil produced from coal tar by distillation?

A. It is no more distilled oil than any other fraction that comes over. Of course, the term "distilled oil" can be applied in that way. It is called an oil, and it is made by the process of distillation.

Q. Mr. Miller, as a matter of fact, is not the substance in the bottle, "Petitioner's Exhibit C," or in any other of these bottles here, produced from coal tar by subjecting the coal tar to a certain degree of heat, the substance passing over being condensed?

A. That is true, yes.

Q. And this substance is the substance that has passed over between certain degrees of temperature?

A. Yes, sir.

Q. That is known as the process of distillation, is it not? A. Yes, sir.

Q. So that, as a matter of fact, this is an oil produced from coal tar by distillation?

A. I am afraid that would require a definition of the word "oil," which is a most marvelous thing.

Q. Is that not commonly known as an oil?

A. It is commonly known as an oil, yes.

Mr. LAKE.—Q. Is it commonly known as an oil, or what?

Mr. KNIGHT.—You can examine the witness again, Mr. Lake; he is now under cross-examination.

Q. As a matter of fact, Mr. Miller, that is actually known as an oil, whether you call it a dead oil or a heavy oil? A. That term has been applied to it.

Q. And it is commonly and usually known to chemists as an oil of some kind, is it not?

A. Yes, sir, dead oil.

Q. And therefore one of the kinds of oil. Now, it is produced by distillation from coal tar?

A. Yes, sir.

Q. And still do I understand you to say that that would not be known, or is not, as a matter of fact, rather, a distilled oil, striking out the word "known"?

A. Scientifically speaking, or how?

Q. I am speaking with reference to the process through which it has been put, with reference to its method of preparation.

A. Well, it might possibly be called that, but it is not known as that.

Q. I am not now asking for what it might be called. I want to know if, as a matter of fact, regardless of what nomenclature, that term might be applied—regardless of what chemists might call it, or men buying and selling that oil. I say, is it not, as a matter of fact, a distilled oil?

A. No, sir, I would not say it is a distilled oil.

Q. Although it is produced by distillation from coal tar. I want to know what it is, as a matter of fact. I do not care what term is applied.

A. It might be considered as a distilled oil.

Q. Do I understand you to say that you would know it rather as a product or preparation of coal tar than as a distilled oil?

A. That is the way I designate it, yes.

Q. Do you mean to say that that is the commercial designation of it?

A. The commercial designation of it is dead oil, or creosote.

Q. Dead oil or creosote, you say?

A. I have never heard the term "distilled oil" used in that connection.

Q. If you were buying or selling that article, would you refer to it as a coal tar preparation, or would you say, if buying it, "I want creosote" or "dead oil"?

A. I would say creosote, and I would designate by saying creosote that came over at from 230 to 270 degrees centigrade.

Q. You refer by that to the extent to which it had been distilled—the degree of temperature to which it had been subjected? A. Yes, sir.

Q. As a matter of trade parlance, that article is not known as a preparation or product of coal tar any more than it is known as a distilled oil, is it? You do not hear the term "preparation of coal tar" used on the street in buying or selling that merchandise, do you?

A. No, sir; it is known as creosote. That is the name by which it is known, but I think most people know that it is a product of coal tar.

Q. They know it to be such? A. Yes, sir.

Q. But do they call it such?

A. I should use the word "creosote," if I were calling for it.

Q. You would not use the terms "coal tar product" or "coal tar preparation," would you, any more than you would use the term "distilled oil"?

A. I think I would, because, for instance, by this new process of making water gas, there is an oil tar, and that oil tar gives an inferior quality of creosote. So that if I were going to buy any creosote, I would designate it as creosote, a product of coal tar distillation, contradistinction to the other, which gives a very inferior quality of creosote.

Q. So you think it would be necessary that you should

refer to it as the oil which is the dead oil or creosote which is a product or preparation of coal tar?

A. Yes, sir.

Q. Have you ever so referred to it?

A. I have never bought any.

Q. You have never bought any, you say?

A. No, sir.

Q. Have you ever sold any?

A. I have never sold any, either.

Q. Have you ever had any means, then, of knowing especially what the commercial designation of that oil is?

A. I have, sir, because I have visited the Pacific Refining and Roofing Company, who do a good deal of distilling, and buy tar from the gas company, for which I am acting as consulting chemist. So I am quite familiar with the subject. The gas company sells the Pacific Refining and Roofin Company both oil tar and coal tar, and in that way I am familiar with the technical and commercial terms. I have been all through the coal tar distillery here, too.

Q. Do you know of any trade lists or journals, or of any quotations of this substance?

A. No, sir, I can refer you to the specification of Dr. Tidy and Professor Abel, of London, both well known chemists, and among their specifications for creosote, they especially state that the product be from gas works in which the coal is carbonized, in distinction from the oil tar, which is now a commercial article.

Q. But in specifying it, they specify creosote or dead oil, or refer to the particular product of coal tar, do they not, but as a further designation, they say, which is produced from such and such a source, as contradistinguished from oil which is produced from other sources?

A. They say from gas works in which the coal is carbonized, designating it as being from coal tar and not from oil tar.

Q. How would you designate phenacetin, Mr. Miller—by any other term?

A. I would say it is a coal tar product.

Q. You would say it is a coal tar product?

A. Yes, sir.

Q. You would apply the term "coal tar product" as naturally and as commonly to phenacetin as you would to this product, would you not?

A. Hardly, because it is so very remote. In phenacetin the raw material has been subjected to such a process of refinement that it is presented in a state quite remote from coal tar. This substance here is directly from coal tar by distillation, without any further manipulation, whereas phenacetin has been refined and recrystallized, and subjected to further modification.

Q. As I understand you, the phenacetin has in the first place been put through the very same processes as these distillations here, but has been further refined and separated into one of the constituent elements of the coal tar? A. Yes, sir.

Q. But it is very difficult on the first distillation to separate the product into the various ingredients?

A. In fact, Mr. Knight, I do not believe that prenacetin exists in the coal tar or in the distillation as phenacetin. It is built up by synthesis with other products. I do not believe there is any phenacetin in the coal tar.

Q. There are a great many products from coal tar, are there not?

A. There must be a million or more products of coal tar.

Q. Derived in a great many different ways?

A. Yes, sir.

Q. Derived originally, you say, by the distillation of the coal tar, and derived from the product of the distillation by treating that otherwise—with acids largely?

A. Yes, sir; acids and alkalies, and various manipulations.

Q. And a great many of them are not oils or distilled oils, but they have been originally distilled?

A. In the crude state you may call them oils, but of course you can hardly call a crystal an oil. It is a matter of temperature, too, of course. In fact, it comes back to the definition of the word "oil," which, as I say, is marvelous.

Q. Would you say that phenacetin is an oil?

A. No, sir, not in the shape as white crystals.

Q. And you might take a hundred substances which were originally from coal tar, and say that they were not oils, might you not?

A. That is true. But if I take the crude carbolic acid, which is also known as an oil, it is nevertheless the crude acid, and is used as such for some purposes—for disinfecting, and things of that sort.

Q. You might get a great many products from that acid or oil which would not be oil, as we understand it?

A. By further manipulation yes, sir.

Q. Why have you such an aversion to the term "distilled oil," Mr. Miller?

A. Well, the term "distilled oil" is so remarkably indefinite; it would appear to me that the term "distilled oil" is more particularly an essential oil.

Q. There are such oils that are not distilled oils, are there not?

A. Oh, yes, the fact is, you might call sulphuric acid a distilled oil; the term is such a loose one.

Q. That is not a distilled oil, according to paragraph 60 of the Wilson Act.

A. Sulphuric acid is an acid, and is made by a process of distillation. So you might call that a distilled oil. The term has no bounds. I would rather advance something more definite, so you could put your finger on it and say, "This is the substance of which we are speaking."

Q. To sum up, Mr. Miller, is it not a fact that the term "preparation or product of coal tar" is no more a commercial term than the term "distilled oil"; that both of those terms refer simply to either the source or the method from which or by which the oils are produced; and, further, that in order to designate the oil itself commercially, you must refer to it by some specific name?

A. No, sir. Because, as I said before, you take the oil tar creosote and the coal tar creosote, the products of the distillation in the two cases, though both are creosote, are two different things; and to designate the creosote properly, you would have to say of one that it was the product of the fractional distillation of coal tar, while of the other one you would have to say that it was the product of oil tar. It would be positively necessary in that case to bring in the term "coal tar product," in order to distinguish between them.

Q. Do I understand you to say, then, that the term "preparation" or "product of coal tar" is a commercial term?

A. I am not a commercial man. I say that if I were to make a contract for creosote, according to Dr. Tidy's and according to Abell's specifications, I would put in the contract that the creosote furnished should be from coal tar distillation.

Q. But you say that, not being a commercial man, you

would not know whether it was a commercial term?

A. I would not, perhaps, know the commercial term.

Redirect Examination.

Mr. LAKE.—Q. I think you stated, did you not, Mr. Miller, that carbolic acid is called an oil, one of the middle oils?

A. In the crude state it would be. It might belong in the category of a middle oil.

Q. Splitting it up into the divisions I have mentioned, and dividing it up as they do into products derived by the application of certain degrees of heat in each case?

A. Yes, sir.

Q. And you could get more or less of a pure carbolic acid from it by redistillation?

A. By redistillation, yes, sir.

Q. Even in a crude carbolic acid, if you applied your heat and kept watch of it carefully, the percentage of carbolic acid obtained upon first distillation would be very high, would it not?

A. If you regulate your thermometer very carefully, and used great care, you could get a very fair carbolic acid upon the first distillation.

Recross-Examination.

Mr. KNIGHT.—Q. Do I understand, Mr. Miller, that you get a carbolic acid which is not oil by simple distillation? In fact, it is an oil, is it not—ordinarily known as an oil?

A. Carbolic acid pure is not known as an oil. But if I take the fraction of the middle oils in which the crude carbolic acid distilled, and regulate the heat very carefully, and, instead of taking the whole range of 50 or 60

degrees of temperature, I take it in the first instance, and take perhaps 10 or 20 degrees, I could get a carbolic acid which would be a fairly good acid.

Q. Have you ever known that to be done, Mr. Miller? Have you ever seen it done?

A. I have never seen it done, no; I can do it, though.

Q. To what degree of temperature would you subject that oil in order to get that acid pure and simple, without any of the oil?

A. Without any of the oil? That, of course, would be an impossibility. I say I could obtain a fairly good carbolic acid in that way.

Q. But you are making a distinction between acid and oil, are you not?

A. No, sir. I said that this fraction is called a middle oil.

Q. As I understand, the distillate that comes from subjecting coal tar to a certain degree of heat is, for instance, a middle oil? A. Yes, sir.

Q. And that is composed of various ingredients?

A. Yes, sir.

Q. Do I understand you to say that you can get from that middle oil anything that is not known as an oil, by subjecting it to any particular degree of temperature?

A. I said this: that, instead of doing as is usually done in practice, if you take this fraction, middle oil, by having careful thermometers, you could catch a fraction of this fraction in the first instance, and not by redistillation, and you would get a fairly pure carbolic acid.

Q. In the very first instance—the first substance which passed over when you had reached a certain degree?

A. Yes, sir. It would to a great degree belong to the middle oils; the middle oils would contain a good large

percentage of this carbolic acid, crude carbolic acid.

Q. And you would get the crude carbolic acid pure and simple?

A. Not a pure carbolic acid, but you would get a very good carbolic acid, and it would be in or from the middle oils.

Q. As a matter of fact, it is almost impossible, is it not, Mr. Miller, to separate by mere distillation any of these middle, or heavy, or light oils, so that one will not contain a part of the other?

A. That is what I said in the first instance. In each one of the four divisions or fractions, there would be more or less of all the others.

Q. More or less of what had preceded the particular fraction in question, and more or less of what would follow? A. Yes, sir.

Q. They would be mixed in so that the question of the determination of what the substance might be divided into is more theoretical than practical? That is, for instance, we could take this substance, coal tar, and we can, as a matter of theory, divide it into certain definite fractions. You would say that we have coal tar, the distillation of which would produce, first, the lighter oils; second, the dead oils; and third, pitch, giving to each of the oils its specific name. Then subjecting those various distillates to further fractional distillation, we could get other products?

A. Yes, sir.

Q. And those other products are themselves resolved by treating them with acids in some cases, or by further distillation, into other products still?

A. Yes, sir.

Q. As a matter of fact, then, that is more theoretical than practical, is it not?

A. It is practical, too.

Q. It can be done?

A. Yes, sir. Of course, if we wanted to get aniline, we would not go through this whole scheme; it would not be necessary to do it— it would not be a commercial success.

Q. Commercially, then, it would not be produced in that way? A. No, sir.

Q. Have you yourself made any examination of any of the substances contained in the bottles which have been offered in evidence here?

A. No, sir, not of the contents of any of these bottles, but I have made quite a number of analyses of creosote at different times.

Q. You are referring to your knowledge of creosote in general?

A. Yes, sir. None of these samples have been under my observation.

Mr. LAKE.—Q. Is it not a fact, Mr. Miller, that this substance has been distilled so as to drive off the light oils? That is to say, the light oils are not present in this substance, creosote, are they?

A. This is the fraction called heavy or dead oil.

Q. But the light oil is not present in this substance?

A. The lighter oils would not be present in this, except the traces that I have referred to. But I think the analysis which Professor Price has made of the sample he analyzed, states that there are no traces at all.

Mr. KNIGHT.—Q. Can you take that substance and yourself say what has been driven off in the process of distillation before it came over?

A. No, sir, I could not say as to that.

Q. Or at what degree of temperature it was heated to?

A. No, sir. I could merely testify from the analysis.

Mr. LAKE.--Q. Is it not true, Mr. Miller, that by carefully watching the thermometer when you first put coal tar into the retort, you could get over benzole, for instance, and make a good average benzole?

A. Average crude benzole, yes.

Q. The percentage of benzole obtained in that way in the substance brought over as benzole would be very high, would it not?

A. Yes, sir; I think you would get about a so-called 50 per cent benzole, or something of that sort; I would not say positively.

Q. And is it not true that you would get a 50 per cent naphtha also, by carefully watching the thermometer?

A. I have really had no practical experience myself in the distillation, and I could not say positively.

Q. Do you not think as a chemist that that could be done?

A. It might be done, but I do not think it would be commercially practical.

Q. You do not think it could be done commercially—that it would be practical commercially, but it could be done?

A. My opinion is that it could be done.

Q. At any rate, by the application of heat to coal tar, you could get off the light oil, which would only have in it a trace of the middle oils, could you not? It would not have pitch in it?

A. It would not have pitch in it, no.

Q. And it would not have dead oil in it?

A. It might have merely a trace.

Q. A very small percentage?

A. A very small percentage, yes, sir.

Mr. KNIGHT.—Q. Dependent upon the care which you exercised in the distillation, I suppose?

A. Yes, sir.

W. M. SEARBY, called for the appellant and petitioner, being duly sworn, testified as follows:

Mr. LAKE.—Q. What is your occupation, Mr. Searby?

A. Pharmacist, and professor of materia medica in the Department of Pharmacy of the University of California.

Q. How long have you been such?

A. I have been a pharmacist ever since I was a boy. I have been professor of materia medica about twenty-three or twenty-four years.

Q. Are you in your profession familiar with oils?

A. Yes, sir.

Q. I will show you an analysis here, and ask you if you understand it, marked "Petitioner's Exhibit D," and I will also show you a bottle of substance, marked "Petitioner's Exhibit C."

A. (After examination.) I understand the analysis, yes, sir.

Q. Do you recognize this substance in the bottle? I will say that this analysis, "Petitioner's Exhibit D," is the analysis of the substance in the bottle, "Petitioner's Exhibit C."

A. Judging from this appearance and odor, I should say that this analysis, "Petitioner's Exhibit D," is an analysis of that substance, "Petitioner's Exhibit C."

Mr. KNIGHT.—I suppose I ought to object to any testimony given upon an analysis given by someone else, unless he can absolutely identify it as being correct. It is not the testimony of the witness, otherwise.

Mr. LAKE.—I have made proof of it once, the analysis.

Mr. KNIGHT.—You have proved the analysis, but unless Mr. Searby is able to say that that is a correct analysis, it is not his testimony. I have no doubt it is a correct analysis, but Mr. Searby might have some different

means of procedure, and might come to a different conclusion.

The WITNESS.—I have no doubt it is a correct analysis.

Mr. LAKE.—Q. Are you familiar with the products of coal tar, Mr. Searby? A. Yes, sir.

Q. Do you recognize the substance in that bottle "Petitioner's Exhibit C," by odor or in any other manner?

A. I recognize it as a mixture of stuffs from coal tar.

Q. Do you in your profession know what expressed oils are? A. I do.

Q. Is that an expressed oil, as you know it?

A. No, sir.

Q. You also know what are rendered oils, do you not?

A. I do.

Q. Is that a rendered oil? A. No, sir.

Q. And do you also know, Mr. Searby, what an essential oil is? A. I do.

Q. Is that an essential oil?

A. No, sir, it is not.

Q. All of those names are well known to the trade, are they not? A. Yes, sir.

Q. Are you familiar with the expression, "distilled oil"?

A. That is not a common name, so far as I am acquainted with it.

Q. This substance which I have shown you, contained in "Petitioner's Exhibit C," or which is "Petitioner's Exhibit C," is called creosote, according to the testimony. It is used for the preservation of timber. Do you know that substance, or are you familiar with that substance?

A. I am more or less familiar with it, yes, sir.

Q. Have you ever known that substance to be called a distilled oil, Mr. Searby? A. I have not.

Q. Would you call it a distilled oil?

A. I would not.

Q. What would you call it?

A. I would call it a portion of coal tar.

Q. A portion of coal tar? A. Yes, sir.

Q. It is not known as a distilled oil, is it?

A. Not so far as my knowledge goes.

Mr. KNIGHT.—I suggest that perhaps the question should not be quite so leading.

Mr. LAKE.—Q. Are you quite familiar with that substance, Mr. Searby?

A. I am familiar with it, yes, sir.

Q. What have you heard it called?

A. Creosote more frequently than anything else. That is the common name for it.

Q. How would you describe it?

A. I should probably call it commercial coal tar creosote; coal tar creosote. I use the term "coal tar creosote," because in our business we have another creosote which is quite different from that, and we always specify coal tar creosote when we do not mean wood creosote.

Cross-Examination.

Mr. KNIGHT.—Q. This substance is produced from coal tar by distillation, is it not, Mr. Searby?

A. Yes, sir. However, I would not like to say positively that this particular article was made from coal tar. I would say that judging from the large percentage of residue that fails to distill at 600 degrees Fahrenheit, it is just possible that it may be the residue after distilling off the light oil.

Q. You think that perhaps the substance in "Petitioner's Exhibit C" may be the residue after subjecting it to 600 or 700 degrees Fahrenheit?

A. No, sir, after taking off the light oils, the napht ha and benzole and those products. There is just a possibility of it.

Q. That this may be the residue after taking the light oils off?

A. That this may be the residue after taking off the light oils, yes.

Q. You do not know to what degree of temperature the substance in "Petitioner's Exhibit C" has been subjected? A. I do not, no, sir.

Q. For all you know, that might itself be what has been taken off and subjected to a heat of from 600 to 800 degrees Fahrenheit, and not a residue left. Is that not the fact? A. I did not catch your question.

Q. This might itself be the product of the distillation, might it not, and the residue left after that has passed off be another substance, the coal tar having been subjected to a temperature of from 600 to 800 degrees Fahrenheit?

A. It is not likely that that residue would be left after it had been subjected to 600 or 800 degrees Fahrenheit.

Q. Might not this be the substance that has passed off from the coal tar when that coal tar has been subjected to a temperature of from 600 to 800 degrees?

A. That might be.

Q. And in that case this might be the distillate?

A. It might be the distillate, yes, sir.

Q. Distilled oil, as a matter of fact, is not a commercial term, is it?

A. Not with us, so far as I know.

Q. That is, so far as you know, it is not?

A. So far as I know, it is not a commercial term.

Q. It simply describes the process through which the oil has been put; that is, the process by which the oil has been obtained?

A. I do not know how it is applied; I know that as a common thing, it is not a term we use, and I deal in volatile or essential oils to a considerable extent.

Q. But you do not know the term "distilled oil" as a commercial term?

A. I do not know it as a commercial term, no sir.

Q. Speaking of the term "product or preparation of coal tar," you would not use that term itself to apply to this substance, would you? You would refer to it as coal tar creosote, would you not?

A. Yes, sir.

Q. You would denominate it in that way so as to distinguish it from wood creosote?

A. Yes, sir, I would speak of creosote as coal tar creosote or wood creosote, according to which I wanted. That substance is crude coal tar creosote.

Q. You would know by the terms as you have given them what was meant? A. Yes, sir.

Q. You do not import this substance yourself, do you?

A. No, sir.

Q. You are not acquainted with the use of the terms in the importing trade, are you?

A. No, sir, I do not think I am.

REDIRECT EXAMINATION.

Mr. LAKE.—Q. Then you make a distinction between the two forms of creosote, the wood creosote and the coal tar creosote? A. Yes, sir.

Q. And you say you would require the full term to be used in order to explain what kind of creosote was required, a coal tar creosote or wood creosote?

A. Yes, sir.

Q. That they are entirely different substances?

A. They are entirely different substances, yes.

RECROSS-EXAMINATION.

Mr. KNIGHT.—Q. Wood creosote is an oil, is it not?

A. No, sir. It is a mixture of phenols, and it is not an oil.

Q. So, then, as a matter of fact, wood creosote is not produced by distillation, is it? A. Oh, yes.

Q. Is it produced as directly by distillation as this substance in the bottle, "Petitioner's Exhibit C," is?

A. Yes, sir. One is produced by distillation from wood, and the other by distillation from coal tar.

Q. In the case of the wood creosote, how does the substance pass over? Does it assume liquid form after passing over? A. Yes, sir.

Q. And then it solidifies?

A. No, sir, it is a liquid.

Q. It is a liquid, is it? A. Yes, sir.

Q. But not an oil?

A. Not an oil, no, sir.

Q. The substance in controversy here, for instance, in the bottle "Petitioner's Exhibit C," is an oil, is it not?

A. No, sir.

Q. You would not call that an oil?

A. No, sir, it is a mixture of things.

Q. Does not an oil contain a mixture of things? Is that your criterion for determining what is and what is not an oil?

A. That is a mixture of substances, some of which could not possibly be called oils. You could not call anthracene an oil.

Q. Suppose the substance were subjected to further distillation, so much so that whatever there is solid in there should be left, and the remainder pass over. Would you say that the liquid that had passed over was an oil? A. No, sir.

Q. You would not? A. No, sir.

Q. Because it contains what?

A. It contains acids, and so far as I know, it does not contain an oil—a single substance that is an oil.

Q. What is your definition of the term "oil"?

A. That is one of the hardest things in the world to define. I do not think I could give one.

Q. According to your idea, does an oil never contain an acid?

A. I beg your pardon. I did not quite understand.

Q. According to your conception of the term "oil," an oil does not include an acid?

A. An oil is not an acid.

Q. I say, according to your conception, it does not include an acid. Is that your idea of the term?

A. I must explain to you that when ordinary oils take fish oil, for instance, and such as that, are decomposed, we get from one to five or six or more different acids.

Q. Therefore they do contain acids?

A. They do, yes, sir, but they have to be decomposed to yield them.

Q. In this case you would say that this is not an oil because it contains an acid, and it has not been subject to decomposition, to yield the acid? I refer to the substance in "Petitioner's Exhibit C".

A. Yes, sir, it not only contains acid, but it contains other things. So far as I know, it does not contain an oil at all.

Q. I am trying to get at what you mean. What would you say that substance would have to contain in order to contain an oil? As you say, it is a pretty difficult thing to define, but you are laying down what, so far as this investigation is concerned, is an entirely novel idea of

what an oil is. You say that is not an oil and that it does not contain an oil; that it contains acid, but that fish oil contains acids which are yielded when decomposition has taken place. Now, I want to know, why do you say that this does not contain an oil?

A. I will tell you, then, that there are two kinds of bodies which we are in the habit of calling oils; one class of bodies is what are known as the fixed oils, such, for instance, as linseed oil, almond oil, and fish oil; those bodies consist of mixtures in varying proportions of glycerides—glyceryl stearate, glyceryl oleate, glyceryl palmitate, and a number of others; I need not go any further.

Q. That is a fixed oil?

A. That is a fixed oil, yes, sir.

Q. Why are they termsed "fixed oils"?

A. Because they cannot readily be distilled. They are not volatile.

Q. You say they cannot readily be distilled—at what degree of temperature?

A. It is not a question of degree of temperature. You cannot distill them without decomposition, therefore they cannot be distilled. The others are called volatile oils, sometimes called essential oils. In France they are called essences, and in England, some of them are called essences.

Q. They are distilled, are they?

A. They are volatile oils, not all obtained by distillation; some are and some are not. But they are volatile oils just the same. Oil of almonds may be an expressed oil, obtained by expression—as you say, an expressed oil, which is the fixed oil of almond. The same almond, after having the oil taken out of it, is put into a still with water, and then distilled, and the distillate is a distilled

oil. That is the volatile oil of almonds. The two oils, the fixed oil of almonds and the volatile oil of almonds, are as distinct as you can imagine, and yet they are both contained in almonds. There is the first idea. The name "oil" is applied to flavoring substances, those which give the flavor or odor of vegetable substances; the term "oil" is commonly applied to them, but it is an inappropriate term, and so regarded, I think, by every chemist.

Q. Then your idea of what oil includes is more an arbitrary distinction than anything else, is it not?

A. I do not quite catch your point, but I can say that the way in which we use the term is very arbitrary.

Q. That is, you are referring to your retail trade as chemist?

A. No, sir, I mean the common language of the people. The term "oil" is arbitrarily used. Oil of vitriol, for instance, is a purely arbitrary term.

Q. You differ, then, with every witness who has been summoned in this case, upon the question of whether or not the substance in controversy here is called an oil.

A. Yes, sir, I do to that extent, to the extent they have spoken of light oils, using the factory name. The name "light oil" is mainly applied to naphtha and benzole. They are not oils.

Q. They are not oils?

A. No, sir. You cannot find any chemical authority who will admit that benzole is an oil.

Q. Then you would say that no product of coal tar is an oil? That there could not be an oil produced from coal tar?

A. I do not say that, because we can produce thousands of things from coal tar, and that would be saying more than I am competent to say.

Q. We will say, then, in the four or five main divisions,

the four or five main fractional distillations, without going into the refined product.

A. In those divisions, no product known as an oil could be obtained.

Mr. LAKE.—Q. Do you mean no product known as an oil, or according to your understanding of the term "oil"?

A. According to my understanding of the term "oil," I do not know of any oil that exists in that bottle.

Q. Or in any other bottle here?

A. Or in any other of the bottles, according to my understanding of the term "oil." I do not look upon creosote as an oil. It is a phenol, and a phenol is not an oil.

The further taking of depositions herein was, by consent of counsel, continued and adjourned until 2 o'clock. P. M.

Afternoon Session.

Met pursuant to adjournment, at two o'clock P. M. There were present the referee and the respective counsel, and further proceedings in the matter of taking said depositions were thereupon had as follows:

JOHN D. ISAACS, recalled for the appellant and petitioner.

Mr. LAKE.—Q. Mr. Isaacs, what is your profession?

A. I am a civil engineer.

Q. In the employ of what company?

A. In the employ of the Southern Pacific Company.

Q. I show you two bottles, marked respectively "Petitioner's Exhibit A," and "Petitioner's Exhibit B," and I ask you what they are, if you know?

A. (After examination.) They are creosote.

Q. Will you state what familiarity you have, if any, with the contents of those two bottles?

A. I have made analysis from each of them.

Q. You state that you are in the employ of the Southern Pacific Company. Among other things, have you any familiarity with this creosote which you have mentioned? A. I have.

Q. State what that is.

A. I have had occasion to make numerous analyses of it, and to use it right along in the preservation of timber.

Q. In your duties as an employee of the Southern Pacific Company, state what familiarity you have with creosote, and with the creosote which is the subject of this litigation.

Q. What do you mean by O. K.-ing.

A. I have been charge of the Southern Pacific Company's creosoting plants. Then, too, I have found it necessary to familiarize myself with the materials used for wood preservation, and in doing so, I have studied up pretty thoroughly the question of the manufacture and nature and constituents of creosote, and have investigated it and learned to analyze it, and have analyzed a great many samples. In fact, all samples of creosote imported or bought are submitted to me for analysis before settlement of the bills. The invoices also come to me for O. K.-ing.

A. When the creosote is bought, the shipper sends an invoice stating how many casks there are, and what the quality of the goods is. When I receive the invoice, I examine the creosote, and I either certify that it is suitable material for our purposes, or decline to receive it, or turn the thing back to the purchasing jobber, who makes an adjustment of the matter.

Q. What enables you to so certify those bills?

A. The analysis of the material, and the certificate of weights as to the amount received.

Q. What study have you given to the subject of creosote? A. I have given a good deal of study to it.

Q. During what period?

A. Since 1889, and more especially since 1891.

Q. I will show you "Petitioner's Exhibit A" and "Petitioner's Exhibit B," and will ask you if you made an analysis of those two bottles. A. I did.

Q. I show you this paper, which I will mark "E" for identification, and ask you what that is.

A. This is an analysis of sample marked "Petitioner's Exhibit A," which analysis was made by me.

Q. I show you now another paper, which I will mark for identification "F," and ask you what that is.

A. That is an analysis of sample marked "Petitioner's Exhibit B," also made by me.

Q. Will you please state from your knowledge of the substance contained in these two bottles referred to by you, and also from your experience with this substance in the abstract, where these two substances came from which are contained in these two bottles, and what the substance is.

A. Do you mean what country they came from?

Q. No, where they came from—where you obtained them.

A. This sample was handed to me by yourself, Mr. Lake; that is "Petitioner's Exhibit A." The other sample, "Petitioner's Exhibit B," I had taken by my foreman at the Oakland works from what we know as Tank No. 2. That has already been brought out in my testimony.

Q. Is there any difference between those two substances?

A. Not in kind, but in the relative proportion of constituents there is a difference.

Q. In the relative proportion of the constituents there

is a difference, but in kind they are the same substance. Is that it? A. They are the same substance.

Q. Referring now to the analysis marked "E," will you state from that analysis what this substance contains?

Mr. KNIGHT.—You refer, Mr. Lake, to the substance in the bottle marked "Petitioner's Exhibit A"?

Mr. LAKE.—Yes.

A. This substance, of which I took a part, first warming it and shaking it so as to make sure to get an average, I found to contain no water and no ammonia. I found that it was completely liquid below 60 degrees Fahrenheit. I did not freeze it, to see how far it would remain liquid. Its specific gravity, at 15 degrees centigrade, was 1.06. The distillation of it showed it to contain tar acids by volume 9.4 qer cent; naphthalene, 15.2 per cent; and residuum left after the distillation had been carried up to 600 degrees Fahrenheit, 28 per cent. Liquid solvents of the solid constituents distilling between 200 and 400 degrees Fahrenheit, were 4.5 per cent; and between 400 and 600 degrees Fahrenheit, 42.9 per cent.

Q. Liquid solvents 4.5 per cent—between what degrees was that percentage obtained?

A. From 200 to 400 degrees, 4.5 per cent. And from 400 to 600 degrees Fahrenheit, 42.9 per cent.

Q. What did you say the 9.4 per cent was?

A. Crude tar acids—phenols.

Q. Phenols? A. Yes, sir, phenols.

Q. And what was the 15.2 per cent?

A. Solid crystalline naphthalene.

Q. And what was the 28 per cent?

A. That was residuum, consisting of a mixture of anthracene and pitch.

Q. What is the consistency of that residuum at ordinary temperature, Mr. Isaacs?

A. It is about like tallow in cold weather. It is in form a solid, greasy substance.

Q. Take it in an ordinary temperature?

A. At an ordinary temperature, yes, sir.

Q. What temperature would it take to dissolve it?

A. To melt it? A. Yes.

A. Well, I suppose it would remain fluid down to about 300 degrees Fahrenheit.

Q. Three hundred degrees Fahrenheit.

A. Yes, sir, or above 200 degrees, anyhow. I have never tried it, but I know that is about it.

Q. Below 200 degrees Fahrenheit, it would be solid?

A. Yes, sir.

Q. What is the naphthalene which you have mentioned?

A. A white crystalline substance with a disagreeable smell.

Q. And the phenols, what are they?

A. The tar acids. They hold about the same relation to the benzine series that the alcohols do to the simpler hydrocarbons—the Professor can correct me, if I am wrong technically. They are true acids, in the sense that they combine with bases.

Q. What are the liquid solvents that you have mentioned?

A. They are pure hydrocarbons.

Q. Now, look at the analysis which has been marked "F," and state what that is an analysis of.

A. That is an analysis of the sample "Petitioner's Exhibit B."

Q. And what proportion of phenols is there in "Petitioner's Exhibit B"? A. 7.5 per cent.

Q. And of naphthalene? A. 32.8 per cent.

Q. And of residuum? A. 16 per cent.

Q. And of liquid solvents?

A. Those from 200 to 400 degrees Fahrenheit, 4 per cent; and from 400 degrees to 600 degrees, 39.7 per cent.

Q. Then the bottle marked "Petitioner's Exhibit A," as I understand it, contains 52.6 per cent of phenols, naphthalene, and residuum, and 47.4 per cent of liquid solvents—am I right in that?

A. That is correct.

Q. And "Petitioner's Exhibit B" contains 56.3 per cent of phenols, naphthalene, and residuum, and 43.7 per cent of liquid solvents—is that true?

A. That is correct.

Q. I will show you a bottle marked "Petitioner's Exhibit C," and also an analysis marked "Petitioner's Exhibit D," made by Professor Price, and ask you under what circumstances and how the contents of that bottle were obtained, if you know, and also an explanation of the exhibit.

A. I instructed our resident engineer to send to you, Mr. Lake, a sample taken in the same way—I think the wording of my communication to the engineer was "a fair, average sample," if I remember rightly, of the same invoice of creosote all that from which "Petitioner's Exhibit B" was taken; and from the signature on this bottle, and the way it is labeled, I suppose that is intended to represent it.

Q. Does that so represent a fair average sample of it?

A. I do not think it does, no.

Q. You do not think it does?

A. No, sir

Q. Do the two exhibits marked "Petitioner's Exhibit

A" and "Petitioner's Exhibit B" show a fair average sample of the creosote imported?

A. Well, the sample "Petitioner's Exhibit B" I know was taken in the way that we usually take what we call a fair average sample, that is a sample from which we would pay for the goods. This sample "Petitioner's Exhibit A" I know nothing about. I do not know how it was taken. This material generally comes either in casks or partly in casks and partly in the water ballast in the ships; that is ships which are supplied with tanks use the tanks for water ballast when they have no fluids to transport, when they have fluids, they generally draw off from the supply of creosote at the company's warehouse the more easily pumped and fluid portions, and place it in the water ballast, and the other portion is afterwards melted by steam and pumped hot into casks, because there are no steam coils in the ballast tanks on the ships; and we have to import the solid substance in casks, while the more fluid substance is pumped out. Therefore, in getting our samples, we never take a sample like those (referring to "Petitioner's Exhibit A" and "Petitioner's Exhibit C") but we take the whole invoice and put it into our storage tanks (we have eight of them at Oakland, six 50,000 gallon tanks and two 30,000 gallon tanks)—put it into one or more of these tanks and heat it, and have it stirred up thoroughly with paddles. And then, as a further precaution, in order to get an average sample, because it is money to use in paying for it, we take samples from three different heights in the tanks, as I have already explained. I know that this bottle "Petitioner's Exhibit B," was one of the bottles that came from the center of the tank. We take a stick, and put it down into the creosote, and the height of the creosote is marked. Then we take three bottles, and lash

one a foot below the top, one a foot from the bottom, and one in the middle of the height of the creosote. Then we tie a string to each cork, and sink the empty bottles into the creosote and pull the strings simultaneously. In that way we think we will get an average.

Q. And the creosote is heated at that time?

A. Yes, sir, and is kept heated and stirred up all during the time of taking the samples. In making analysis, when I have plenty of time I generally analyze each of three bottles separately, but if I have not the time, I mix together portions from each of the three bottles.

Q. What is the consistency of this substance at ordinary temperature, taking an average sample?

A. Our specifications require that it shall be completely liquid at 100 degrees Fahrenheit, and that there shall be no deposit below 90 degrees Fahrenheit. But below that we pay no attention to its actual state. We have found, however, by experience, that creosote which conforms with our specifications—that is, that it shall contain not less than 25 per cent of residuum above 600 degrees Fahrenheit, not less than 20 per cent naphthalene, and about 8 per cent tar acids—that creosote of that description is invariably solid up to about 70 degrees Fahrenheit always solid at 60 degrees, as solid as that is—I imagine this room is somewhat warmer than 60 degrees now.

Q. So it is a semi-hard mass?

A. Yes, sir; we cannot pump it or handle it without warming it. That is the reason why we limit the temperature at which it shall be fluid at 100 degrees, in order that we may be enabled to pump it from these various tanks in the yard.

Q. Do you know the process, Mr. Isaacs, by which this creosote is obtained?

A. It is obtained by the fractional distillation of coal tar.

Q. Do you know whether or not this substance is always produced by simple distillation?

A. Generally it is not produced by the first simple distillation.

Q. State how it is done.

A. Professor Price testified that the nature and constituents of this creosote depended largely upon the kind of coal and the temperatures and the process by which the creosote was formed. Now, our specifications require a certain relative proportion within the limits between these constituents. As a rule the normal creosoteas it is called, so far as I have noticed or observed, rarely has exactly those proportions or anywhere near them. There is sometimes, as in the creosote made by the Pacific Roofing and Refining Company here in San Francisco, a large excess of tar acids. Of course if we were to purchase that creosote, it merely means that a certain portion of it, representing an excess of tar acids, would be thrown away, useless to us in our work. That is really the reason why we have specifications. We want to keep it at about what experience and a large number of observations and records, have taught us; also what we have gained from eastern roads and the English railroad men and the French, and others. It has been pretty generally settled among men who preserve timber that the proper relative proportions are about what our specifications call for.

Q. And what are those relative proportions?

A. I have already given them. Not less than 25 per cent of heavy residuum, not less than 20 per cent of naphthalene, about 8 per cent of tar acids, and the rest fluid solvents.

Q. What do you mean by "fluid solvents"?

A. I mean what Professor Price calls the basic oils. They are certain hydrocarbons; as well as I have been able to learn, they are pretty pure hydrocarbons—fluid at ordinary temperatures. We could use other solvents for the purpose. Those fluid hydrocarbons are really, so far as I know, of no use to us in the process of creosoting. They are simply media or means of enabling us to handle these denser and more solid substances. Probably it would be as well if I were to explain the mechanical theory of creosoting, to show you why we have arrived at this particular specification.

Q. I do not know that that is material. I think you went into that this morning.

Mr. KNIGHT.—Yes, we went into the application of the creosote to the timber.

The WITNESS.—I should like to say, though, what the use of the different portions of the creosote are.

Mr. LAKE.—Q. Very well. Go on.

A. After drying the timber, as Mr. Knight has already brought out, we have then timber in a state of complete desiccation—the moisture is driven off, the germs are killed, what albuminous substances there are in the sap are partially coagulated like a partially boiled egg, and we are then ready to proceed with the process of rendering the timber proof against either external attacks or internal decay. The part that these different constituents play is this: During this process of injection of these oils, there is a certain mechanical filtration that takes place. The oil has to go through the pores, through these fine cells in the wood, from the outside. The denser residuum remains near the surface. The naphthalene in its liquid state penetrates still further. The tar acids go farther than either. Now, if the tar

acids alone were injected and would stay there, that would be all we would need. They would preserve the timber. But, unfortunately, they are volatile. They have done the work, they have finished the germicidal part of their mission. But they evaporate, and therefore you must have something that is more permanent as an antiseptic to remain in the wood and continue the good work which the tar acids have begun. It has been claimed by some that the tar acids are of no use, because upon an analysis of preserved timber later on, no tar acids were found. But that is not a fact. The tar acids have really done their work by completely killing off the germs in the sap of the wood, the albuminous constituents of it. The naphthalene is more permanent as an antiseptic than the tar acids. It remains in a sort of mat, tangled in the fibres of the wood. Naphthalene by itself is quite volatile, and if exposed to the air, as Dr. Tidy demonstrated in his experiments, would evaporate and leave the wood entirely for a certain definite distance down—he estimated it at about an eighth of an inch below the surface of the timber. When it evaporates to that extent, the timber begins to rot from the outside, especially where it is in contact with the ground, close to the surface. Bugs and animals attack it, and that leaves the naphthalene again exposed to the air, and it again evaporates, and decay again sets in until another portion of the outside comes off. So it is merely a series of attacks from the outside. To prevent that effect, we require about 25 percent of residuum in the creosote. That residuum envelopes the entire timber, remains near the outside by filtration, and prevents the vaporization of the naphthalene as well as furnishing a mechanical resistant against external attacks.

Mr. KNIGHT.—Q. It makes a kind of coat?

A. A kind of coat, yes, that is what it is. Any coating is good for marine animals that is pitchy and hard to attack. Asphalt is very good. But that does not preserve from internal decay—dry rot or internal rot it may be called.

Mr. LAKE.—Q. Mr. Isaacs, is this creosote, this substance to which you have testified, according to the specifications which you have mentioned, among the first distillates of coal tar, or has it passed through other processes to arrive at the specifications mentioned by you?

A. Usually the creosote, as manufactured, does not come up to our specifications, and it has to be treated so as to bring it up to meet our specifications.

Q. Treated in what way?

A. For instance, if there is an excess of tar acids, they are removed from it by treatment with caustic soda or lime.

Q. A chemical?

A. Yes, sir. An analysis is first made showing the excess of tar acids, and then the equivalent of caustic soda is put in and the mass is agitated, and an aqueous solution of phenate of soda forms, which settles to the bottom and is drawn off, leaving the creosote with the proper percentage of tar acids.

Mr. KNIGHT.—Q. Was that the process with the substance in question?

A. That is the usual process.

Mr. LAKE.—Q. You do not know whether this happened with the substance which is the subject of this controversy?

A. I do not know whether it happened or not, no, sir.

Q. It may have been subjected to that process?

A. It may have been. Generally it passes through some such process.

Q. Some mechanical process to arrive at this condition?

A. Yes, sir. Normally you cannot depend upon its having the constituents in the proper proportion. If it has too little residuum, they put some pitch back. If it has too much naphthalene, the quantity of that is reduced.

Mr. KNIGHT.—Q. But you can, by regulating the temperature, obtain any particular fraction?

A. By regulating the temperature, you can obtain any fraction that you want to which enters into this substance but you cannot obtain any particular combination that you want to.

Mr. LAKE.—I understand you that according to your specifications which you require to be filled in purchasing this substance, this substance may have been passed through a process of chemical combination to take out something, or something might have been put back or into it. Is that true?

Mr. KNIGHT.—I object to that question, upon the ground that the matter to be decided here is not what may have been done, but what has been done.

Mr. LAKE.—Q. You have known that to be done with this substance

A. Yes, sir.

Q. What is this substance?

A. Creosote.

Q. How would you describe it, from your knowledge of the substance? What would you call it?

A. I would call it a mixture of the products of coal tar, distilling at about from 300 degrees to 800 degrees Fahrenheit.

Q. Mr. Isaacs, when you put coal tar into a retort and apply heat to it, is there any product of that coal

tar which comes over which is not called an oil?

A. Sometimes there is water, and sometimes there is ammonia.

Q. Are they not all called oils, light oils and heavy oils?

A. Yes, sir, they are. The first distillation is called a light oil; the next distillation is called a middle oil; the third distillation is called a heavy oil, and the last distillation is called an anthracene oil.

Q. And then there is a residuum called pitch?

A. Yes, sir.

Q. There is not a single product, then, of the distillation of coal tar that is not called oil?

A. The names I have given are the workmen's names. They say, "Here is a light oil; here is a middle oil; here is a heavy oil; and here is an anthracene oil."

Q. What is the shop name for light oils? That is to say, what is the real name for what they call light oils in the shop? That is what I meant to ask.

A. The light oil is a mixture of benzole and naphtha.

Q. By the application of heat to coal tar, could you not, carefully noticing the thermometer, cut off a pure naphtha or a pure benzole?

A. Not absolutely pure, no, sir.

Q. What percentage do you think there would be of one in the other? Or, first, could you not cut off a combination of benzole and naphtha?

A. Yes, sir, with a small amount of the middle amounts and a less amount of heavy oils, and a trace of the anthracenes.

Q. And so following all the way through?

A. Of those which are the nearest to any one of them, that one will have the most of, while of those which are the farthest from it, it will have the least.

Q. There would be a very light percentage of the other oils in the light oils, would there not?

A. Yes, sir. You would call it somewhere about 50 per cent benzole, 25 per cent or 30 per cent of naphtha, and say 7 per cent or 8 per cent of the middle oils, and 1 per cent or 2 per cent of the heavy oils, and a trace of the anthracene oil, the oil farthest away.

Q. And could you not follow right straight through in the distillation, and obtain the same results with all of the oils, by carefully watching the thermometer?

A. Yes, sir, by selecting your temperatures you can, within certain ranges, get a fairly pure distillate in any fraction that you want. But each fraction always has more or less of the others, a trace of those are farthest away, and more and more of the others as you get nearer.

Mr. LAKE.—We now offer in evidence the analysis of the contents of "Petitioner's Exhibit A," which has been identified by the witness and marked "E" for identification, and ask that it be marked "Petitioner's Exhibit E"; and also offer in evidence the analysis of "Petitioner's Exhibit B," which has been identified by the witness and marked "F" for identification, and ask that it be marked "Petitioner's Exhibit F."

(The analyses so offered in evidence on the part of the petitioner were here marked respectively as asked by counsel.)

Cross-Examination.

Mr. KNIGHT.—Q. What is the specific gravity of the material in the bottle marked "Petitioner's Exhibit B," Mr. Isaacs? Do you know?

A. I have it here, Mr. Knight. (Refers to "Petitioner's Exhibit F.") It is 1.032.

Q. What is the specific gravity of the material in the bottle marked "Petitioner's Exhibit C"?

A. (After reference.) 1.06.

Mr. LAKE.—Q. In "Petitioner's Exhibit C"? Do you mean that?

A. Oh, I do not know as to that; I did not analyze that.

Mr. LAKE.—According to Professor Price's analysis, the specific gravity of the contents of "Petitioner's Exhibit C" is 1.044. Exhibit "C" was analyzed by Professor Price.

Mr. KNIGHT.—Q. As I understand it, Mr. Isaacs, so far as the samples furnished by the petitioner are concerned, we have nothing taken from the top or bottom of the tanks?

A. No, sir, unless this was taken from the top (referring to "Petitioner's Exhibit A"); I do not know that that was taken from the top, but I should imagine that it was taken from either the top or from one of the casks that had only the fluid in it.

Q. Referring now to the bottle marked "Petitioner's Exhibit B," is that of about the consistency now that it was when it was first taken?

A. No, sir, when it was first taken, it was hot.

Q. Hot, and therefore more liquid?

A. Yes, sir.

Q. Do you know how much warmer it was when it was taken than it is now?

A. Well, if it was in accordance with our specifications, it was at about 100 degrees.

Q. One hundred degrees when it was taken?

A. Yes, sir.

Q. You have distilled this substance yourself, have you not, Mr. Isaacs? A. Yes, sir.

Q. And you have obtained a product of water and ammonia as the first result of the distillation?

A. Occasionally traces of water and ammonia. I do not think I have obtained above 1½ per cent.

Q. You would not call either of those substances an oil, would you?

A. Water or ammonia?

Q. Water or ammonia.

A. Not by themselves, no, except as the whole distillation is called an oil.

Q. They really form an inconsiderable part of the distillate such as you made?

A. Yes, sir, as a rule.

Mr. LAKE.—That is the case for the petitioner.

Testimony for Respondent.

C. A. KERN, called for the respondent, being duly sworn, testified as follows:

Mr. KNIGHT.—Q. Dr. Kern, you are the Government chemist, are you not?

A. Yes, sir.

Q. At this Port?

A. Yes, sir.

Q. And have been for how long?

A. Since November 10, 1893.

Q. You are a chemist by profession?

A. Yes, sir.

Q. And have been for how long?

A. Since 1878.

Q. Have you examined or made a distillation of any of the preparations that are before you?

A. Yes, sir, I have, of these two.

Q. "Respondent's Exhibit 1" and "Respondent's Exhibit 2"?

A. Yes, sir.

Q. You have subjected those to distillation, have you?

A. Yes, sir.

Q. Can you now tell me what the result of that distillation was?

A. Yes, sir.

Q. Do you recognize this paper?

A. Yes, sir.

Q. What is that, Doctor?

A. That shows the result of the distillation. Water one cubic centimeter—

Q. (Interrupting.) How did you get that, Doctor? Was that the result of the distillation of any part of "Respondent's Exhibit 2"?

A. A part of this one; I think it is Exhibit 2.

Q. That is "Respondent's Exhibit 2," yes. Do I understand that you took one cubic centimeter?

A. I took 100 cubic centimeters and put it through fractional distillation.

Q. And that is the result?

A. Yes, sir.

Mr. Knight.—I offer in evidence the analysis produced by the witness of "Respondent's Exhibit 2," and ask that the same be marked "Respondent's Exhibit 3."

(The analysis so offered was here marked "Respondent's Exhibit 3.")

Q. You may state what the result of that distillation was.

A. One cubic centimeter of water and ammonia—

Q. (Interrupting.) Have you any memorandum which will show you the degree of heat to which you subjected that substance?

A. I distilled it—

Q. (Interrupting.) What are you reading from now?

A. I distilled it up to 316 to 320 degrees Fahrenheit,

and I got one cubic centimeter of water and ammonia, and 2½ cubic centimeters of benzole, xylol, and numerous combinations.

Q. You say you got 2½ cubic centimeters of benzole and xylol?

A. Yes, sir, benzole and xylol, and all the other combinations—you can never find the end of those combinations.

Q. Then what?

A. Then I distilled it up to 360 to 370 degrees Fahrenheit, and I got 7½ cubic centimeters of what you call light oils, containing carbolic acid and tar acids, etc; that is, oils which are lighter than water.

Q. Those are what are called light oils?

A. Yes, sir.

Q. Whose specific gravity is lighter than water?

A. Yes, sir. And then I distilled further, and got the heavier oils, oils heavier than water, 46 cubic centimeters, containing some of the tar acids and naphthalene. Then you get still heavier oils, called anthracene oils, 17½ cubic centimeters. Then you get 25½ cubic centimeters of what are still heavier oils, and pitch, residuum.

Q. How high did you go in your distillation?

A. My thermometer did not reach the end of it; at any rate, up to 700 or 800 degrees, I think.

Q. How high did it accurately register—do you know?

A. About 600 degrees.

Q. Did you make any analysis by distillation of the subject that is marked "Petitioner's Exhibit B"?

A. I don't remember that. I don't know. I have made several of them. I made at least ten or twelve or fourteen analyses.

Q. Have you the results of those here?

A. No, sir, I have not.

Q. Where did you get "Respondent's Exhibit 2"?

A. It was delivered to the appraiser.

Q. Do you know whether that was delivered to you as a sample of this merchandise in controversy?

A. This is the official sample, delivered to me for investigation.

Q. Is the substance contained in the bottles before you known as a distilled oil, or not?

A. It is distilled oil.

Mr. LAKE.—That I object to as not being responsive to the question.

Mr. KNIGHT.—Q. Technically, Doctor, you can answer that question by yes or no.

A. Yes, sir.

Q. Is it known as a distilled oil?

A. It is known as a distilled oil.

Q. And was so known on the 28th of August, 1894?

A. Yes, sir.

Q. There has been no change in the same?

A. No, sir.

Q. It is also a preparation or product of coal tar, is it not?

A. Yes, sir, it is a product of coal tar.

Q. Do you know whether either of those terms is merely used in referring to the substance, or is the substance designated by a specific name?

A. It is merely known as a creosote oil.

Q. That is, as I understand you, it would not be sold in the market either as a distilled oil or as a preparation of coal tar?

A. No, sir.

Q. How are colors and dyes made?

A. Colors and dyes are made from some of the products of the coal tar. For instance, aniline is made from the product benzole; some others are made from naphthalene; and so on.

Q. And all those are the products of chemical processes?

A. They are prepared by chemical processes.

Mr. LAKE.—Q. Colors and dyes, you say?

A. Yes, sir. Those products, or the foundations of those dyes, are taken and, as we call it, manipulated. They are used in combination with chlorine or sulphuric or nitric acid, and so on—there are endless processes, and it is difficult to specify.

Q. Are they produced by distillation, or treating with acids?

A. They are treated with acids and bases, according to the process.

Q. These colors and dyes are derived from the various by-products of these distillations, are they not?

A. Yes, sir.

Mr. LAKE.—That is a trifle leading.

Mr. KNIGHT.—Q. I want to ask you, Doctor, whether you know what mineral oils are.

A. Mineral oils are hydrocarbons.

Q. How is a mineral oil obtained, and from what?

A. Mineral oil is obtained by distillation.

Q. From what?

A. From crude products.

Q. Of what?

A. Well, crude petroleum is a mineral oil.

Q. To what extent are those liquid, and at what temperature—mineral oils?

A. It depends upon the percentage of pitch, whether it is liquid or solid; or the percentage of paraffine.

Q. Pitch and paraffine are contained in these oils, are they?

A. In the crude oils, yes; not in the tar oils; paraffine is not in tar oils, no; it is only in petroleum oils.

Q. Does paraffine become a solid?

A. Yes, sir.

Q. And at what temperature—do you know?

A. Solid at ordinary temperature. It melts at about 20 or 25 Celsius, I think—we use Celsius more in chemistry than Fahrenheit.

Q. Your first product from this distillation was water, was it not?

A. Water, yes, sir.

Q. Then did you get some ammonia after that?

A. Some traces of ammonia dissolved in water, yes.

Cross-Examination.

Mr. DE HAVEN.—Q. Then you say, Doctor, that this substance is in fact a product of coal tar?

A. Yes, sir, it is a product of coal tar.

Q. And it would not be improper to describe it as such, speaking of it generally—to say that this substance in controversy is a product of coal tar?

A. This is a product of coal tar, yes.

Mr. LAKE.—Q. Why do you say it is a distilled oil?

A. On account of its being obtained by distillation.

Q. On account of its being obtained by distillation?

A. Yes, sir.

Q. You say it is known as a distilled oil because it is obtained by distillation. Is that the only reason you can give?

A. Yes, sir.

Q. That is the only reason you have?

A. It is known in the market as that.

Q. It is known in the market as a distilled oil?

A. As a creosote oil.

Q. As a distilled oil?

A. It is obtained by distillation.

Q. It is known in the market as creosote oil or dead oil, is it not?

A. Yes, sir.

Q. Is it known in the market as a distilled oil?

A. Well, no, I guess not.

Q. Is there any substance in the market known as a distilled oil? You say you are a chemist. You are familiar with pharmacy, are you not?

A. Yes, sir.

Q. Is there any oil in the market known as a distilled oil?

A. Yes, sir.

Q. Known commercially as a distilled oil?

A. Not by name as a distilled oil, but it is a distilled oil.

Q. Do you know anything about the United States Dispensary?

A. Yes, sir.

Q. Is that an approved authority?

A. That is an approved authority, yes.

Mr. KNIGHT.—What edition have you there?

Mr. LAKE.—The edition of 1883.

Mr. KNIGHT.—There are some recent good additions to that.

Mr. LAKE.—Q. I refer you to page 982 of the United States Dispensatory, Doctor.

A. "Volatile oils, distilled oils—those are sometimes called distilled oils."

Q. Go on, Doctor.

A. (Continuing.) "From the mode in which they are

usually procured; sometimes essential oils, from the circumstance that they possess, in a concentrated state, the properties of the plants from which they are derived." Is that all you want?

Mr. LAKE.—You have been reading from page 982 of the United States Dispensatory, the edition of 1883?

Mr. KNIGHT.—Does that specify whether distilled oils are known in the importing trade as such?

Mr. LAKE.—I am simply stating, Mr. Knight, that there are oils known as distilled oils to the trade, and in the United States Dispensatory, which I have here.

Mr. KNIGHT.—I object to the testimony unless it is shown that it is a term used in the importing trade.

Mr. LAKE.—I will read what is stated here and have it go into the record.

Mr. KNIGHT.—Certainly, over my objection.

Mr. LAKE.—I will continue reading from the point where the witness left off. "They exist in all odoriferous vegetables, sometimes pervading the plant, sometimes confined to a single part; in some instances contained in distinct cellules, and preserved after desiccation, in others formed upon the surface, as in many flowers, and exhaled as soon as formed. Occasionally, two or more are found in different parts of the same plant. Thus, the orange tree produces one oil in its leaves, another in its flowers, and a third in the rind of its fruit. In a few instances, when existing in distinct cellules, they may be obtained by pressure, as from the rind of the lemon and orange; but they are generally procured by distillation with water. Some volatile oils, as those of bitter almonds and mustard, are formed, during the process of distillation, out of substances of a different nature pre-existing in the plant."

Q. I simply call your attention to that extract of the

United States Dispensatory, edition of 1883, and I will ask you, Dr. Kern, whether, refreshing your memory from that extract, there are oils known as distilled oils?

A. If you went into a drugstore and asked for distilled oil, they would not know what to give you.

Q. They would not know what to give you?

A. No, sir.

Q. From what college did you graduate, Doctor?

A. From the University in Wurtemberg, Germany.

Q. How long ago?

A. In 1878.

Q. What familiarity have you with this substance here?

A. I worked in a tar distillery as a chemist.

Q. You worked in a tar distillery as a chemist, you say?

A. Yes, sir. And I have made analyses here of coal tar, in 1883, I think it was, for the San Francisco Gaslight Company.

Q. Let me look at that analysis of yours, will you please, Doctor?

A. Yes, sir. (Hands to counsel.)

Q. Then you say that in this analysis which you made of the substance in question, there is but one cubic centimeter of water?

A. Yes, sir.

Q. And two and a half cubic centimeters of benzole?

A. Of benzole, xylol, etc., etc.

Q. Do you not know, as a fact, that all of these substances when you begin to distill coal tar are known as oils?

A. I do not understand that.

Q. Do you not know that the products of coal tar, when you apply heat to coal tar and have begun to dis-

till, are all called oils—such as benzole, naphtha, naphthalene, and carbolic acid, and so on?

A. They are distilled oils.

Q. Are they not known as oils—light oils and middle oils?

A. Yes, sir, they are known as oils.

Mr. KNIGHT.—That is all the testimony we have to offer.

Mr. LAKE.—That is all on the part of the petitioner.

Petitioner's Exhibit D.

Thomas Price & Son, Analytical and Consulting Chemists, 524 Sacramento Street.

San Francisco, Cala., Jany. 28th, 1897.

Fred B. Lake, Esq.

Dear Sir: We have made a careful chemical analysis of a sealed sample of creosote, marked "Creosote Sample, Center No. 1 Tank, Nov. 26, 1896," and beg to report as follows:

The specific gravity we find to be 1.044, and the material is fluid at 78 degrees Fahrenheit. Its composition we find to be as follows:

Water..... .... none
Distillate from 100 to 200 degs., F. none.
Distillate between 200 and 400 degs., F., 5.20 cu. centims.
Distillate between 400 and 600 degs. F.,74.80 cu. centims.
Residue remaining at temperature above
600 degrees F., ...20.00 cu. centims.

The material contains, tar acids, 8.75%; naphthalene, 9.30%.

Yours truly,
THOMAS PRICE & SON.

Petitioner's Exhibit "E."

Creosote Analysis.

West Oakland, Cal., Dec. 24th, 1896.

50 c. c. taken from bottle marked:
" Invoice 3652 Ex. R. R. marked:
" 2200 casks marked:
" Liquid Creosote marked:
" Mar. 22, 1895, marked:

Completely liquid below 60 degrees F.
Specific gravity at 15 degrees C., 1.06

	% by Volume.
Water ....none.	
Ammonia .... none.	
Distillate below 200 degrees F., none.	
" 200 to 400 degrees F., 2.25 c. c.	A.5
" 400 to 600 degrees F., 21.45 c. c.	A.2.9
Tar acids..... ....A.70 c. c.	9.4
Naphthalene .... 7.60 c. c.	15.2
Residuum over 600 degrees F 14.00	28.0
50	100.

JOHN D. ISAACS.

To Mr. F. B. Lake.
12-28-96

Petitioner's Exhibit "F."

Creosote Analysis.

West Oakland, Dec. 24, 1896.

100 c. c. taken from bottle marked.
" sample of creosote marked:
" center No. 2 Tank marked:
" Nov. 26th, 1896, marked:
" sample produced Dec. 21st, 1896, J. K., marked:

Completely liquid at 80 degrees F.
Specific gravity at 25 degrees C., 1.032
Water ....none.
Ammonia ....none.
Distillate below 200 degrees F., none.
" 200 to 400 degrees F., A. c.c.
" 400 to 600 degrees F., 39.7 "
Tar acids .... 7.5 "
Naphthalene .... 32.8 "
Residuum over 600 degrees F. 16. "

100. "

JOHN D. ISAACS.

To Mr. F. B. LAKE.
12-28-96.

Respondent's Exhibit 3.

No. 18. Treasury Department.

1 c. c. Water.
2½ c. c. Benzole, xylol, etc. (lighter than water).
7½ c. c. Light oils, carbolic acid (heavier than water).
46 c. c. Heavy oils (carbolic acid, naphthalene, etc.).
17½ c. c. Heavy oils.
25½. Anthracene oil, pitch, etc.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC CO., for a Review of the Decision of the United States General Appraisers, Relative to Classification of Certain "Creosote" Merchandise Imported by said Southern Pacific Company.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

I, F. N. Shurtleff, the referee appointed by the Circuit Court of the United States, Ninth Circuit, and Northern District of California, to take such evidence as might be produced in the above-entitled matter, as well on behalf of the petitioner as the respondent therein, do hereby certify:

That the testimony and proceedings appearing in the foregoing transcript, consisting of ninety-three pages, were taken and had at Room 85, Appraisers' Building, northeast corner of Sansome and Washington streets, in said city and county of San Francisco, and at the time set forth in said transcript, to-wit, the 28th day of January, 1897, between the hours of ten o'clock A. M. and four o'clock P. M. of said day.

That John D. Isaacs, Thomas Price, Harry East Miller, and W. N. Searby were called and examined as witnesses on behalf of the petitioner in said above-entitled matter, and C. A. Kern was called and examined on be-

half of respondent therein; that previous to giving his testimony each of said witnesses was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in said cause.

That said testimony was taken stenographically and put into typewriting by Ernest J. Mott, a skillful stenographer, a disinterested party, by and with the consent and approval of the parties to said above-entitled matter.

That upon the hearing of said matter, as aforesaid,Frederick B. Lake, Esq., and John J. De Haven, Esq., appeared as counsel for the petitioner, and Samuel Knight, Esq., Assistant United States Attorney, appeared as counsel on behalf of respondent.

That accompanying said depositions and forming part thereof are Exhibits A, B, C, D, E, and F introduced on the part of the petitioner, and Exhibits 1, 2, and 3 on the part of the respondent.

That said testimony, so taken, together with said exhibits, I now deliver into the court for which they were taken.

In witness whereof, I have hereunto set my hand this third day of April, in the year one thousand eight hundred and ninety-seven.

F. N. SHURTLEFF,
U. S. General Appraiser, Referee.

Be it further remembered, that on the 27th day of August, 1897, the said matters having been theretofore argued and submitted to the Court for decision and judgment upon the law and facts herein upon due consideration thereof, it was by the Court found, established, and decided in accordance with the findings of fact and conclusions of law and decision made and entered on the said 27th day of August, 1897; and judgment in accordance therewith was thereupon entered herein.

Now, therefore, whereas the foregoing matters hereinbefore particularly set forth appear not of record, to the end that said matters, and all thereof, may be preserved and made of record, respondent and appellant herein, the above-named Collector of Customs, hereby respectfully presents to this Honorable Court the foregoing bill of exceptions, and upon the stipulation hereto attached of counsel for the petitioner and appellee herein prays that the same may be settled and allowed as and for the bill of exceptions in the above-numbered and mentioned case.

JOHN H. WISE,
Collector, etc., Respondent and Appellant.
By SAMUEL KNIGHT,
Asst. United States Attorney.

It is hereby stipulated by and between the parties hereto and their respective counsel that the foregoing bill of exceptions contains a full, true, and correct report and statement of all the testimony and evidence introduced by either side in the above-mentioned and numbered case, and may be settled, allowed, and approved as and for such bill of exceptions.

Dated September 28, 1897.

FRED'K B. LAKE,
Attorney for Importer, Petitioner, and Appellee.
SAMUEL KNIGHT,
Asst. United States Attorney, for Collector Respondent and Appellant.

Order.

The foregoing bill of exceptions in the above case is hereby settled, allowed, and approved and ordered filed nunc pro tunc as of August 27, 1897.

Dated September 28, 1897.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Bill of exceptions. Filed Sept. 28, 1897, nunc pro tunc as of Aug. 27, 1897. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY for a Review of the Decision of the United States General Appraisers, Relative to the classification of Certain Creosote Imported by said Company. } No. 12,247.

Petition for Appeal.

The respondent in the matter above named, the Collector of the Port of San Francisco, California, appellant herein, considering himself aggrieved by the decision and judgment rendered and entered herein on the 27th day of August, 1897, doth hereby appeal from said decision and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and upon the authority of the attorney general of the United States, who makes application therefor, prays that this, his appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said decision and judgment were

made and rendered, duly authenticated, may be sent to said Circuit Court of Appeals.

Dated September 23, 1897.

JOHN H. WISE,
Appellant.
By SAMUEL KNIGHT,
Asst. United States Attorney.

Order.

And now, to-wit, on the 23d day of September, 1897, it is ordered that the said appeal be allowed as prayed for.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed September 23, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit Northern District of California.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY, for a Review of the Decision of the United States General Appraisers, Relative to the classification of Certain Creosote Imported by said Company.

Assignment of Errors.

And now, upon this 23d day of September, 1897, comes the respondent and appellant herein, the Collector of the

Port of San Francisco, State and Northern District of California, by the United States Attorney for said district, and says that in the record herein there is manifest error in this, to-wit:

I.

That said Circuit Court erred in finding and deciding that the merchandise involved herein was not at or before the time if its importation into said port, under the late Tariff Act of August 28, 1894, and now is not known chemically, or at all, as a distilled oil.

II.

That said Court erred in not finding and deciding that said merchandise is and was and is and was known chemically and otherwise, as a distilled oil, as well as a product of coal tar.

III.

That said Court erred in not finding and deciding that said merchandise is not, and was not, a preparation of coal tar.

IV.

That said Court erred in holding, adjudging, and deciding that the merchandise in controversy is not, and was not, specially provided for in said act other than as a product of coal tar, not a color or dye.

V.

That said Court erred in not holding, adjudging, and deciding that the said merchandise was specially provid-

ed for in paragraph 60 of said act of August 28, 1894, as a distilled oil, and was dutiable at the rate of twenty-five per centum ad valorem upon its importation.

VI.

That said Court erred in not holding, adjudging, and deciding that said merchandise was not provided for in paragraph 443 of said act of August 28, 1894, and was not under such act free of duty as a product of coal tar.

VII.

That said Court erred in not holding, adjudging, and deciding that products of coal tar were not provided for in said paragraph 443 of said act.

VIII.

That said Court erred in reversing and setting aside the decision of the Board of U. S. General Appraisers herein, and in adjudging that the action of the Collector of said Port herein was erroneous in assessing and liquidating duties on the merchandise in question.

IX.

That said Court erred in holding, adjudging, and deciding that the importer of said merchandise, the said Southern Pacific Company, petitioner in the above-entitled proceeding, was entitled to judgment herein,

X.

That said Court erred in directing the entry of judg-

ment herein in favor of the said Southern Pacific Company.

JOHN H. WISE,
Respondent and Appellant.
By SAMUEL KNIGHT,
Asst. United States Attorney.

[Endorsed]: Filed September 23, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to-wit, the July term, A. D. 1897, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California held at the courtroom in the city and county of San Francisco, on Thursday, the 23d day of September, in the year of our Lord, one thousand eight hundred and ninety-seven.

Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

In the Matter of the Application of the SOUTHERN PACIFIC COMPANY, for Review of a Decision of the Board of U. S. General Appraisers, Relative to Certain "Creosote." } No. 12,247.

Order Allowing Appeal.

Upon motion of Samuel Knight, Esq., Assistant U. S. Attorney, and upon the filing by him of a petition for order allowing an appeal, together with an assignment of errors herein, it is ordered that an appeal from the judgment and decision entered August 27th, 1897, herein

be, and hereby is, allowed to the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified transcript of the record and proceedings herein be forthwith transmitted to said Court.

At a stated term, to-wit, the July term, A. D. 1897, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Thursday, the 30th day of September, in the year of our Lord, one thousand eight hundred and ninety-seven.

Present: Honorable WILLIAM W. MORROW, Circuit Judge.

In re Application of SOUTHERN PACIFIC COMPANY, for Review of Decision of Board of U. S. General Appraisers, Relative to Certain Creosote. } No. 12,247.

Order Allowing Withdrawal of Exhibits.

On motion of Samuel Knight, Esq., Assistant United States Attorney, it is ordered that the appellant herein be, and hereby is, allowed to withdraw from the files of this court all original exhibits of material in this cause, for the purpose of transmitting the same to the United States Circuit Court of Appeals for the Ninth Circuit, as part of the record upon the appeal herein.

[Endorsed]: Filed Sept. 24, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

[Endorsed]: No. 408. United States Circuit Court of Appeals for the Ninth Circuit. John H. Wise, as Collector of the Port of San Francisco, State of California, Appellant, vs. Southern Pacific Company, Importer of Certain Creosote, Merchandise, etc., Appellee. Transcript of Record. Upon Appeal from the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

Filed November 20, 1897.

F. D. MONCKTON,

Clerk.

No. 408.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JOHN H. WISE, as Collector of the Port of San Francisco, State of California,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, Importer of Certain Creosote, Merchandise, etc.,
Appellee.

APPELLANT'S BRIEF

SAMUEL KNIGHT,
Ass't U. S. Attorney.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN H. WISE, as Collector of the Port of San Francisco, State of California,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, Importer of Certain Creosote, Merchandise, etc.,

Appellee.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

The merchandise in question, consisting of 2,200 barrels of the article hereinafter mentioned and described in the invoices as "liquid creosote," was imported from

London, England, into the United States, at the Port of San Francisco, State and Northern District of California, on the 19th day of March, 1895, by the Southern Pacific Company, appellee herein, and thereupon said merchandise was entered at the Customhouse at this port for immediate consumption. It was thereafter by appellant, John H. Wise, as Collector of Customs, classified upon the return of the appraiser of such port as "distilled oil," dutiable at the rate of twenty-five per cent. ad valorem, under paragraph 60 of the Tariff Act of August 27, 1894, (28 U. S. Stats., at p. 509), the said entries were liquidated in accordance with this classification, and the duty upon the merchandise, amounting to the sum of $1.472, was ascertained, levied and collected by appellant as such Collector.

Thereupon appellee appealed to the Board of United States General Appraisers on the ground that the merchandise in question was not a distilled oil, but should be admitted free of duty under paragraph 413 of the Act of August, 1894, as a product of coal tar, not specially provided for; and the Board sustained the decision of the Collector, holding and deciding that the merchandise in controversy was not a product of coal tar, admissible free of duty, but was a distilled oil, subject to a duty of twenty-five per cent. ad valorem, under parapraph 60 of the Tariff Act referred to. The importer then applied to the Court below for a review of the questions of law and fact involved in the decision of the Board of General Appraisers under the Customs Administrative Act of

June 10, 1890; and the Court reversed the Appraisers' decision, holding that the merchandise was a product of coal tar, and not known as a distilled oil, and therefore, governed exclusively by paragraph 443 of the Act of 1894. The Collector appeals.

POINTS AND AUTHORITIES.

Appellant contends that:

(*1.*) *Products of coal tar are not free of duty under paragraph 443 of the Tariff Act of August 27, 1894.*

(*2.*) *The merchandise in controversy is known as a distilled oil, as well as a product of coal tar; and even if embraced within the terms of paragraph 443 is, nevertheless, more properly provided for under paragraph 60 of the Tariff Act referred to.*

I.

PRODUCTS OF COAL TAR ARE NOT FREE OF DUTY UNDER PARAGRAPH 443 OF THE TARIFF ACT OF AUGUST 27, 1894.

The importer's protest against the action of the Collector of the Port must be specific, and the Southern Pacific Company is limited to it.

Act of June 10, 1890, Sec. 14.
In re Gerdau 54 Fed. Rep., 143.
U. S. v. Curley, 66 Fed. Rep., 720.

In its protest the importer claims that the article in controversy is not a distilled oil and dutiable as such under paragraph 60 of the Wilson Tariff Act; but that it is a product of coal tar and admissible free of duty

under paragraph 443 of the same Act. If, therefore, products of coal tar are not free of duty under such paragraph, appellee's case must fail, regardless of what the substance is, its commercial character or rate of duty applicable thereto.

This leads us to consider the proper construction of *paragraph 443* of the free list of the *Wilson Act*. It reads: "Coal tar, crude, and all preparations ex- "cept medicinal coal tar preparations and products "of coal tar, not colors or dyes, not specially pro- "vided for in this Act."

In other words, coal tar, crude, is free of duty, and so are all *preparations* of coal tar not specially provided for in that Act; but medicinal coal tar preparations and *products* of coal tar, and colors and dyes therefrom are not free. Generally speaking, therefore, preparations of coal tar, not specially provided for, are free and products of coal tar are not free, but must be included within some of the schedules of duty which precede the free list.

A reference to the *McKinley Act of October 1, 1890*, illustrates and tends to sustain this contention, and shows that this distinction was then recognized by Congress:

Paragraph 538 provided that "coal tar, crude," was free.

Paragraph 731 provided that "tar * * * and pitch of coal tar" was free.

Paragraph 19 provided that "all preparations of coal tar," with certain exceptions, were dutiable at 20 per cent. ad valorem.

Paragraph 76 provided that "products or preparations known as * * * distilled oils * * * * not specially provided for" were dutiable at 25 per cent. ad valorem; and by referring to the preceding *Tariff Act of March 3, 1883 (22 Stats. at L., at p. 493,)* we find:

"Coal tar, crude, ten per centum ad valorem; coal "tar, products of, such as naphtha, benzine, benzole, "dead oil, and pitch, twenty per centum ad valorem. "All coal tar colors or dyes, by whatever name "known, and not specially enumerated or provided "for in this Act, thirty-five per centum ad valo-"rem. All preparations of coal tar, not colors "or dye, not specially enumerated or provided for in "this Act, twenty per centum ad valorem."

Thus we see, without further notice of earlier tariff acts, that Congress made a distinction between *preparations* and *products* of coal tar.

This prompts us to ascertain what the difference is between a *preparation* and a *product.*

Says the *Century Dictionary:*

"Prepare, * * *; to adapt by alteration or ar-"rangement * * *; 4. To provide or procure for "future use; hence, to make; form; compound; manu-"facture; * * *" "Preparation, * * * "2. Formation; composition; manufacture, as the "preparation of gun powder; the preparation of "glycerine, * * * 7. That which is prepared, "manufactured or compounded; as a chemical prepa-"ration, a preparation of oil and wax; * * *"

"Produce, * * * To bring forth; generate;

" bear; furnish; yield; * * * To bring into being " or form * * *;" "Product, that which is pro- " duced * * *; In chemistry a compound not " previously existing in a body, but formed during " decomposition; as the products of destructive dis- " tillation; contradistinguished from educt."

The petitioner does not claim that the article is a *preparation* of coal tar, but that it is a *product.* Under his protest, therefore, he can not be heard to say that such article should be admitted free of duty as a *preparation* of coal tar. Besides, as a matter of fact it is not a preparation but a product, obtained from coal tar admittedly by a process of destructive distillation.

Says *Sadtler* in his work on *Industrial Organic Chemistry, p. 329*:

" Destructive distillation has been defined as ' the " ' decomposition of a substance in a close vessel in " ' such a manner as to obtain liquid products.' It " must be observed here that the word product is " used to indicate something not originally present in " the substance distilled. A body may be obtained " in the liquid distillate which has merely been " driven over by heat and which already existed in " the original material in physical or mechanical ad- " mixture. Such a body is, to speak exactly, an " *educt* and not a *product.*"

The constituents of the creosote before the Court are the result of the decomposition of other substances by destructive distillation and are not merely *educed* or *drawn* from the basic material in their original

condition. There are countless preparations of coal tar, and also there are innumerable products therefrom, as we shall shortly show. Prof. Price, for instance, one of the witnesses called in the importer's behalf testified to this difference upon his cross-examination. His testimony upon this point reads (Transcript, pp. 80–82):

"Q. There are other products of coal tar besides distilled oil, are there not, Professor?

A. Yes, sir.

Q. What other products (products or educts, I use the term in a general way) are there of this coal tar, Professor?

A. I understand your meaning. There are a great many others. For instance, nearly all of the coloring materials that are now in use are derived from coal tar.

Q. But they are not distilled oils, are they?

A. No, sir. They are separated from some of these products, like from this creosote material.

Q. That is to say, they are separated by acids?

A. They are separated by acids and by alkalies, depending entirely upon what it is—by regular chemical operation.

Q. As a matter of fact, Professor, there are hundreds and hundreds of products which are derived from coal tar, are there not?

A. Yes, sir.

Q. The products of coal tar are almost innumerable, are they not?

A. Yes, sir.

Q. And a great many of those products are not what would be ordinarily known as distilled oil?

A. No, sir; they would not. They have been ob-

tained, however, from a product that was once distilled. For instance, you take sulphenol, which I sometimes take, and phenacetin—all of those are compounds of coal tar.

Q. The coal tar is originally distilled, in order to get the substance which the phenacetin or these various other products are produced from?

A. Yes, sir.

Q. Phenacetin is in the form of a powder, is it not?

A. Yes, sir. For instance, in order that we may be thoroughly understood, I will say this: If one takes coal tar, which is one of the by-products in the manufacture of coal gas, and breaks it up roughly, he will have the four main products that I have mentioned, or four divisions.

Q. That is to say, there are four main divisions?

A. Yes, sir. Then you take each one of those main divisions, and it can in turn be broken up, and from it innumerable compounds produced. I suppose the compounds of coal tar can be reckoned up into the thousands at the present time. They are simply the result of working further along one of those four lines, along the line of the first, second, third or fourth main product.

Q. That is, you take the various products derived from the first, second, third and fourth fractional distillations, we will say.

A. Yes, sir.

Q. And you would, by working those products further, for instance by acids, or by other treatment, get all those innumerable substances as a result?

A. Yes, sir.

Q. Some of them would be derived from the product of the first distillation?

A. Yes, sir.

Q. And some would be derived from the product of the second, and some from the third, and some from the fourth distillation?

A. Yes, sir, making them into other compounds."

If the Court will read this testimony in the light of the definitions *supra* it will become manifest that the importer's merchandise is not entitled to be admitted free of duty, inasmuch as it is not a preparation of coal tar, and is not so designated in the protest.

II.

THE MERCHANDISE IN CONTROVERSY IS KNOWN AS A DISTILLED OIL, AS WELL AS A PRODUCT OF COAL TAR; AND EVEN IF EMBRACED WITHIN THE TERMS OF PARAGRAPH 443, IS NEVERTHELESS MORE PROPERLY PROVIDED FOR UNDER PARAGRAPH 60 OF THE TARIFF ACT OF 1894.

If the foregoing interpretation of paragraph 443 is not correct, let us concede, for the argument, that Congress has provided in this paragraph for the free admission of products of coal tar, not specially provided for. What then? We contend it is specially provided for in *paragraph 60 of the same Act*, which reads:

" Products or preparations known as alkalies, alka-
" loids, distilled oils, essential oils, expressed oil, ren-
" dered oils, and all combinations of the foregoing,
" and all chemical compounds and salts, not specially
" provided for in this Act, twenty-five per centum ad
" valorem."

While it is the recognized practice of an appellate court ordinarily not to disturb findings of the lower court drawn from conflicting evidence, *it will do so not only where the evidence is insufficient to sustain such findings but also where the evidence is largely documentary.*

The Supreme Court of the State of California has, in a very recent decision, stated what the proper practice is in this respect, saying in

Wiester vs. *Wiester*, decided May 29, 1897,

that where the evidence is largely documentary, being contained in the depositions of witnesses, the opportunities of the appellate court to judge of its value are as good as those of the court below, and the general doctrine that the appellate court will not interfere in a case of substantial conflict of evidence has no application.

The testimony in the case at bar consists, under sections 14 and 15 of the Act of June 10, 1890, of the papers embraced in the return of the Board of U. S. General Appraisers to the Court below, as well as the depositions of certain witnesses who testified before that tribunal, and the further depositions of witnesses called by the importer, (and in one instance by the Collector,) which were taken before a General Appraiser as Referee, together with the exhibits offered in evidence. There is absolutely no oral evidence taken before the Court below, and it had no advantages or facilities in arriving at its findings of fact and conclusions in this case that this Court does not equally possess. Therefore, under the decision to which we

have just adverted and by reason of the nature of the evidence produced in this case, it is, we submit, within the scope of the Appellate Court's investigation to examine this evidence *de novo*, and ascertain for itself whether or not the findings of fact of which appellant complains is established and sustained by a fair preponderance of testimony, as well as to determine whether or not there is sufficient evidence to support it.

The Court below found as a fact that

" Said merchandise was not, nor is it, a product or " preparation commonly, or commercially, or chemi- " cally, or otherwise, known as a distilled oil " (Transcript p. 49.)

The terms "distilled oil" and " product of coal tar" are not commercial terms, but are used to denote the origin or process of manufacture of the article.

Vid. Return of Board of General Appraisers, testimony of Isaac D. Fletcher, (Transcript, p. 22), W. H. Rankin (Transcript, p. 24), Alfred H. Smith (Transcript, p. 36), James Hartford (Transcript, p. 42), Harry Comer (Transcript, p. 39), Opinion of Board of Appraisers (Transcript, p. 45); and the testimony of Prof. Thomas Price (Transcript, pp. 73, 74), Harry East Miller (Transcript, p. 96), W. M. Searby (Transcript, pp. 107, 109, 110), taken in the appellee importer's behalf, and Dr. C. A. Kern's testimony (Transcript, pp. 137, 139), taken for the appellant Collector.

Admitting that the substance in controversy is a product of coal tar, it is also a distilled oil. Every witness states that it is produced by distillation; and, with one or two exceptions, that it is known to be an oil and so called.

The Appraiser of Merchandise in San Francisco, James E. Tucker (Transcript, p. 13), says that the samples of the merchandise in controversy "are a "distillation product of the coal tar * * * and " correctly returned as distilled oil."

The Chemist of the office of the New York Appraiser of Merchandise, Haydn M. Baker, in a report approved by Dr. Edward Sherer, the Chemist in charge, and Walter H. Bunn, the Appraiser there, says (Transcript, p. 14): "The merchandise as a whole " is an oily body and complicated mixture of chemi- " cal compounds, and also a product of coal tar elim- " inated by distillation."

W. H. H. Childs says the merchandise is an oil (Transcript, p. 17) produced by distillation (Transcript, p. 20), corroborated in both respects more fully by Isaac D. Fletcher (Transcript, pp. 22, 24), and further corroborated by W. H. Rankin (Transcript, p. 23). Alfred H. Smith testifies (Transcript, pp. 27, 31) that the substance is known as an oil " produced by a process known as distillation" (Transcript, p. 32), Harry Comer says (Transcript, p. 37) that he recognizes the merchandise as dead oil; and James Hartford says, the product is one of the distillates of coal tar (Transcript, p. 41). The Board of U. S. General Appraisers thereupon found the sub-

stance to be a distilled oil (Tran., p. 45), and dutiable as such.

When the testimony introduced by the importer and taken before the referee appointed by the lower Court is considered, we are amused at the futile efforts of the witnesses in some instances to avoid admitting that the article in controversy is known as an oil produced from coal tar by the process of distillation. They are rapid and eager in their declarations that it is a product of coal tar, but they avoid the terms "distilled oil" and "oil," as if some contagious disease were lurking there, and thereby fail to realize that they repeatedly contradict themselves in their efforts to escape the dreaded expressions. Prof. Price says, upon his direct examination, that every product, except coke, that comes over from the retort in the application of heat to coal tar, including the substance in question, is called by chemists, as well as commercially, an oil (Transcript, pp. 69–71). "It is a "product of the distillation of coal tar," he evasively replies to the query, "and among the known distilled "oils is the oil in question, is it not?" (Transcript, p. 73.) He further testifies (Transcript, p. 74) that he would know, as matter of fact, that the article is not only an oil produced by distillation from coal tar, but that it is also a product of coal tar. The Court's attention is also directed to the excerpt from his testimony hereinabove given. It now occurs to the learned counsel for appellee that even the term "oil" must be suppressed. Accordingly he opens his redirect examination of this witness (Transcript, pp.

84, 85) and is answered as follows, the witness thereby contradicting his former testimony in this particular. (*Vid. supra*).

"*Mr. Lake.*—Q. Professor Price, I want to ask you this question, in order to get this matter entirely straightened out. I want to be corrected if I am not right. I understood you to say that you would not call this substance an oil at all, that you would call it a product of coal tar. Is that correct?

Mr. Knight.—I object to the question upon the ground, first, that it is ambiguous. The witness should first state whether he is speaking chemically or in the ordinary commercial sense, before he answers the question.

Mr. Lake.—I am speaking chemically now. That is what I intended by the question.

A. No, sir; I would not call that an oil.

Q. I also understood you to say that this substance was not known as a distilled oil, and that you would not so designate it?

A. It is not known as a distilled oil, according to my understanding of a distilled oil.

Q. You simply call it creosote?

A. I would ask for creosote if I wanted that article.

Q. You were also speaking about crude phenols, and you stated that they were carbolic acid?.

A. Yes, sir.

Q. Is it not true (I think you stated it before) that that also is called an oil?

A. Yes, sir.

Q. And is obtained by distillation?

A. Yes, sir; it is obtained by distillation.

Q. Is naphthalene called an oil, and is it obtained by distillation?

A. It is obtained by distillation, and I believe it is sometimes also called an oil.

Q. Is not naphtha called one of the lighter oils?

A. Yes, sir; it is called one of the lighter oils.

Q. And is not benzole called one of the lighter oils?

A. Yes, sir."

But the witness in replying to the next question:

"Is there a single substance that is not known by chemists as an oil, which is produced from coal tar by distillation, from the time they begin to apply heat to the coal tar, except coke?"

again does not strictly adhere to his former testimony in saying:

"In the subdivisions which I have given, they are all called oils."

As counsel did not use the term "produced" as contradistinguished from "educed," and the witness had formerly informed us that there were innumerable preparations and compounds of coal tar that were not distilled oils but were separated by acids and alkalies into powders and similar substances.

Mr. Harry East Miller says on his direct examination (Transcript, p. 91) that the article in controversy is not known as a distilled oil, commercially or chemically, though it is known as an oil produced by distillation (Transcript, p. 92). All products of coal tar by process of distillation are known as oils, except the residuum pitch (Transcript, p. 93). "The whole product I would "call an oil." Upon his cross-examination the witness' admissions come most reluctantly (Transcript, pp. 94-95):

"*Mr. Knight.*—Q. As a matter of fact, it is a dis-
" tilled oil?"

A. In what way, Mr. Knight?

Q. Practically; that is, looking at the process through which it has been put. It is an oil produced from coal tar by distillation?

A. It is no more distilled oil than any other fraction that comes over. Of course, the term "distilled oil" can be applied in that way. It is called an oil, and it is made by the process of distillation.

Q. Mr. Miller, as a matter of fact, is not the substance in the bottle, "Petitioner's Exhibit C," or in any other of these bottles here, produced from coal tar by subjecting the coal tar to a certain degree of heat, the substance passing over being condensed?

A. That is true, yes.

Q. And this substance is the substance that has passed over between certain degrees of temperature?

A. Yes, sir.

Q. That is known as the process of distillation, is it not?

A. Yes, sir.

Q. So that, as a matter of fact, this is an oil produced from coal tar by distillation?

A. I am afraid that would require a definition of the word "oil," which is a most marvelous thing.

Q. Is that not commonly known as an oil?

A. It is commonly known as an oil, yes.

Mr. Lake.—Q. Is it commonly known as an oil, or what?

Mr. Knight.—You can examine the witness again, Mr. Lake; he is now under cross-examination.

Q. As a matter of fact, Mr. Miller, that is actually known as an oil, whether you call it a dead oil or a heavy oil?

A. That term has been applied to it.

Q. And it is commonly and usually known to chemists as an oil of some kind, is it not?

A. Yes, sir, dead oil.

Q. And therefore one of the kinds of oil. Now, it is produced by distillation from coal tar?

A. Yes, sir.

Q. And still do I understand you to say that that would not be known, or is not, as a matter of fact, rather, a distilled oil, striking out the word "known"?

A. Scientifically speaking, or how?

Q I am speaking with reference to the process through which it has been put, with reference to its method of preparation.

A. Well it might possibly be called that, but it is not known as that.

Q. I am not now asking for what it might be called. I want to know, as a matter of fact, regardless of what nomenclature might be applied—regardless of what chemists might call it, or men buying and selling that oil. I say, is it not, as a matter of fact, a distilled oil?

A. No, sir; I would not say it is a distilled oil.

Q. Although it is produced by distillation from coal tar. I want to know what it is, as a matter of fact. I do not care what term is applied.

A. It might be considered as a distilled oil.

Q. Do I understand you to say that you would know it rather as a product or preparation of coal tar than as a distilled oil?

A. That is the way I designate it, yes

Q. Do you mean to say that that is the commercial designation of it?

A. The commercial designation of it is dead oil, or creosote."

Mr. Miller ends his cross-examination (Transcript, pp. 100, 101) by contradicting Professor Price on the commercial use of the expression "product of coal tar," but admits he does not know the commercial term.

W. M. Searby says he is not acquainted with the term "distilled oil" (Transcript, p. 107). He would call the substance in controversy "a portion of coal tar" (Transcript, p. 108). On cross-examination he says he does not know how the term "distilled oil" is applied (Transcript, p. 110) and is not acquainted with the use of terms applied to the article in the importing trade. Mr. Searby, however, distinguishes himself by taking issue with every other witness, contending that the substance is not an oil (Transcript, pp. 111-113-115). He cannot give a definition of oil, however (Transcript, p. 112), admits (Tran- p. 114) "that the way in which we use the term is very arbitrary." John D. Isaacs was recalled to the witness chair, and avers on his direct examination that the article is called an oil (Transcript, p. 128). Dr. C. A. Kern, the Government chemist, was the only witness called in the Collector's behalf before the Special Referee, and he says (Transcript, p. 134) that the creosote is known as a distilled oil which is not a commercial term (Transcript, pp. 137, 139).

The article in controversy, therefore, appears to be described and included in both the paragraphs of the Act hereinefore quoted. Which governs? It is respectfully submitted that the latter (60) should here prevail, because,

(1) *It is more specific than paragraph 443.*

The Board of U. S. General Appraisers said (Transcript, p. 45):

"The provision for distilled oils in paragraph 60 is more specific than the general provision for preparations and products of coal tar in paragraph 443 of the Act."

The Court will observe in reading the testimony, that many, in fact countless thousands of products of coal tar are not distilled oils. Many, for instance, are powders.

> *Vid.* Price's testimony (Transcript, pp 81, 82), Miler's testimony (Transcript, pp. 98, 99), and Searby's testimony (Transcript, p. 114). For instance, we have coal tar fluid (SS. 16,818, G. A. 3,337), coal tar dyes (S. 17,767), ammoniacal gas liquor (SS. 17,441, G. A. 3,615), "creolin-Pearson" (SS. 17,391, G. A. 3,582), acetanilid (*U. S.* vs. *Chemical Co.*, 79 Fed. Rep. 315), phenacetin, etc., etc.

The term "distilled oil" is more specific than the term "preparation of coal tar."

See particularly SS. 10,958, also 17,400, G. A. 3,591, which precede the decision by the Board of Appraisers in the present case; and

Matheson vs. *U. S.*, *71 Fed. Rep., 394*,

where the Circuit Court of Appeals for the Second Circuit held that sulphotoluic acid, which is both an acid and a preparation of coal tar, but not a color or

dye, should be properly classed, under the Act of October 1, 1890, in the phrase (paragraph 473), "Acids used for medicinal, chemical, or manufacturing purposes, not specially provided for in this Act," and not in the paragraph (19) providing "All preparations of coal tar not colors or dyes, not specially provided for in this Act." * * *

Judge Wallace, in rendering the opinion, said that the phrases "not specially provided for in this Act," found in each of the foregoing paragraphs neutralized each other, and that this case fell "within the "rule that, where an article is designated by a specific "name in one provision of a tariff act, that provision, "instead of another employing general terms, though "sufficiently broad to comprehend it, will fix its "character for the purposes of duty."

The difference in phraseology between the Tariff Act of March 3, 1883, and the later tariff acts we submit deprives the case of

Reiche vs. *Smythe*, 13 Wall., 162,

cited by one of the learned counsel for appellee in the Court below, of any weight here.

The Act of 1883 (22 Stats. at L. at p. 493) specified dead oil as a product of coal tar dutiable at 20 per cent. ad valorem. The Act under consideration provides (under our concession *supra*) that products of coal tar, *not specially provided for*, are free. The merchandise in question, however, is specially provided for as "distilled oil," which, as we have seen, is a more

specific term than "product of coal tar," and this Court said in the case of

Grace vs. *Collector*, *79 Fed. Rep., at p. 319.*

"It is also true that, where the words of the Statute " to be construed differ from the words of a former " Act on the same subject, it is an intimation, at least, " that they are to have a different construction."

It is true that District Judge Townsend in the case of

Warren Chemical Mfg. Co. vs. *U. S.*, *78 Fed., Rep., 810,*

decided that the article here involved should be admitted free of duty under paragraph 443 of the Wilson Act; but the learned Judge apparently was not thoroughly advised concerning this substance, and could not have had before him such testimony as has been introduced in the case at bar, for he says (p. 811): " It has not been shown, however, that this article is " an oil in fact, or that it is chemically, or commer- " cially, or commonly known, as 'distilled oil.' "

It has been proven in the case at bar that the article is chemically, at least, known as, and is in fact, a distilled oil, and is admittedly called in commerce an oil, " creosote oil."

The learned Judge of the Court below fell into the error of assuming that the testimony in that case was the same as that in the case at bar, and quoted the Court's decision there to sustain a like finding of fact here (Transcript, pp. 55, 56)—a practice which this Court has discountenanced in one of the cases decided by it last term,

Chew Hing Lung vs. *Wise* (*Tapioca Starch Case*).

(2) *The higher of two different rates of duty, both applicable to an imported article, should prevail.*

The latter part of section 4 of the Wilson Act, following *in totidem verbis* the corresponding part of section 5 of the McKinley Act, provides:

"If two or more rates of duty shall be applicable to "any imported article it shall pay duty at the high- "est of such rates."

Paragraph 60 provides a higher rate of duty upon the article in question than paragraph 443. Therefore it should govern; for there is no reason why the government should be given the benefit of the doubt when different amounts of duty are applicable, and denied that benefit because one paragraph puts the article upon the free list. All of the articles named in the Act are referred to in the preamble of that Act. Non-dutiable as well as dutiable articles are technically "articles imported from foreign countries * * * and mentioned in the schedules herein contained," and subject to the "rates of duty" prescribed; and it is submitted the rule of classification just quoted, is here applicable regardless of the comparative rates of duty imposed in different paragraphs relating to the same article. The former rule giving the importer the benefit of any such doubt has thus been changed by express enactment

It is, therefore, respectfully submitted that the decision of the Circuit Court should be reversed.

SAMUEL KNIGHT,
Assistant U. S. Attorney, for Appellant.

No. 108

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

JOHN H. WISE, as Collector of the Port of San Francisco, State of California,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, Importer of Certain Creosote, Merchandise, etc.,

Appellee.

Appellee's Brief.

FRED'K B. LAKE,

Attorney for Appellee.

Filed February ....., *1898.*

.....*Clerk.*

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Appellee's Brief.

The statement of the case contained in appellant's brief is not controverted by appellee.

The paragraphs of the Tariff Act of 1894 (28 U. S. Stats. at Large, p. 511), concerning which the assessment of duty upon the merchandise in question has aroused the present controversy, provide as follows:

> "60. Products or preparations known as alkalies, alkaloids, *distilled oils*, essential oils, expressed oils, rendered oils, and all combinations of the foregoing,

and all chemical compounds and salts, not specially provided for in this Act, twenty-five per centum ad valorem."

Paragraph 443 of Section 2 of the same Act exempting from duty certain imported articles, provides as follows:

"443. Coal tar, crude, and all preparations except medicinal coal-tar preparations and products of coal tar, not colors or dyes, not specially provided for in this Act."

It is under the latter paragraph that appellee claims its exemption from the payment of duty on the importation in question which is admittedly known as "dead oil" or "creosote oil."

The questions involved can be most clearly presented to the Court by calling its attention at the outset to the findings and conclusions of the Board of General Appraisers as contained in the written opinion filed by such board.

The opinion of the board was delivered by General Appraiser Tichenor, and is as follows (Tr., p. 44):

"The merchandise here in question was imported in casks, and is described in the invoices as 'liquid creosote.' It was assessed for duty at 25 per cent ad valorem under the provisions in paragraph 60, Act of August 28, 1894, for 'distilled oils,' and is claimed by the contestants to be exempt from duty under paragraph 443 of said Act.

"We find as facts from the testimony of Dr. Haydn M. Baker, chemist in the laboratory attached to the Appraiser's office at New York, to whom samples of the merchandise were submitted for chemical determination, and from knowledge acquired in the consid-

eration of other cases relative to merchandise of the same general character

"(1) That the merchandise in question is a liquid substance of a dark brown color and tarry odor, of the specific gravity of 1.05392 and 1.05028, and is known generally in commerce as dead oil and creosote oil.

"(2) That it is derived from coal tar by distillation, and is a distilled oil. Its chief constituents are naphtaline and its derivatives along with the basic oils parvoline, coridine, collidine and leucoline and bitumens dissolved therein, together with five per cent of crude phenol of the carbolic and cresylic acid types.

"It is understood that the protestant contends that the merchandise is not dutiable as assessed, upon the ground that it is not commercially known as distilled oil. It is not necessary that it should be so known to bring it under that provision. The various oils known to commerce are distinguished in trade by arbitrary names, such, for example, as olive oil, croton oil, lemon oil, cod liver oil, castor oil, aniline oil, etc., and are not known in commercial sense as 'distilled oils,' 'essential oils,' 'expressed oils,' or 'rendered oils.' These terms are technical, and are used to distinguish the different oils according to the method of their production. It is not disputed that the article in question here is obtained by distillation, and hence, in the sense of the tariff, is known as distilled oil.

"The provision for distilled oils in paragraph 60 is more specific than the general provision for preparations and products of coal tar in paragraph 443 of the Act.

"This view is in harmony with the doctrine of the recent decision of the United States Circuit Court of Appeals for the Second Circuit in the case of Matheson & Co. vs. The United States (71 Fed. Rep., 394), to the effect that the provision for 'acids' in paragraph 473, Act of Oct. 1, 1890, is more specific than

the general provision for all preparations of coal tar not colors or dyes in paragraph 19 of the Act."

It will be observed that the Board of General Appraisers found that the merchandise, which forms the subject of this controversy, is a product of coal tar, and also that it is a distilled oil; that, taken as a whole, the substance has a specific gravity greater than that of water, and the conclusion of the board that the same is subject to duty seems to rest upon the proposition that the provision in paragraph 60 of the Tariff Act making products and preparations known as distilled oils subject to duty is more specific than the general provision found in paragraph 443 of the Act, by which products of coal tar are placed upon the free list.

The opinion of the Circuit Court is to be found at page 53 of the transcript. Its findings of fact and conclusions of law are to be found at page 46 of the transcript.

From the evidence taken before the Board of General Appraisers, and from the evidence adduced at the trial, the Circuit Court found:

"VI.

"That the merchandise comprising the importation involved in this application and petition for review was, on and before the said 19th day of March, 1895, and now is, known in trade and commerce as 'creosote oil' or 'dead oil,' and was and is a product of coal tar, obtained therefrom by fractional distillation.

"VII.

"That said merchandise was not, nor is it, a product or preparation commonly or commercially or

> chemically, or otherwise, known as a distilled oil, but was and is a product of coal tar, not a color or dye, and not otherwise specially provided for in said Act."

Two points are made by the appellant, under either or both of which he asks to have the decision of the Circuit Court reversed.

These points will be taken up in their order.

The first point raised by appellant is as follows:

> "Products of coal tar are not free of duty under paragraph 443 of the Tariff Act of August 27, 1894."

In support of this point appellee asks to have paragraph 443 of the Act above quoted construed as if it read that crude coal tar and all *preparations* of coal tar not specially provided for in the Act were to be admitted free of duty; that medicinal coal tar preparations *and products of coal tar*, and colors and dyes were not to be admitted free of duty, but must be included within some of the schedules of duty which precede the list of articles which are admitted free.

Such a construction of the paragraph seems somewhat strained, to say the least. However, assuming for the sake of the argument that it is doubtful what is meant by the language used, whether products of coal tar are to be admitted free or are to pay duty (and this is the most that can be urged in favor of appellant's construction), the Court is bound to resolve the doubt in favor of the importer.

> "Duties are never imposed on the citizen upon vague or doubtful interpretations."

Powers v. Barney; 5 Blatch., 202.
U. S. v. Isham, 17 Wall., 496-504.
Adams v. Bancroft, 3 Sumner, 384.
Hantranft v. Wiegmann, 121 U. S., 609.

I.

The second point raised by appellant is as follows:

> "The merchandise in controversy *is known as a distilled oil*, as well as a product of coal tar; and even if embraced within the terms of paragraph 443 is, nevertheless, more properly provided for under paragraph 60 of the Tariff Act referred to."

Turning to the evidence contained in the transcript, there is not a witness who testified that the substance known to commerce as "dead oil" or "creosote oil" ever was or is *known* commonly or commercially or chemically, or otherwise, as a distilled oil.

If the language of the Act is read in connection with the evidence, it will be seen that the words "known as" employed in the Act and applied to distilled and other oils was used designedly by the law-makers.

There is no substantial conflict in the evidence as to the real nature—the real constituents of "dead" or "creosote" oil. It is described by Professor Price, a witness for the importer, as a very complicated compound. He says (Tr., p. 71): "The composition of creosote is very complicated. It contains naphtaline, carbolic and cresylic acids, quinoline and various other complicated compounds." And Dr. Baker, the Government chemist at the port of New York, and upon whose analysis the decision of the Board of Appraisers mainly rests, describes it (Tr., p. 14) as a substance "having a specific gravity of 1.05392,

and contains approximately 5 per cent of carbolic and cresylic acids, the remaining 95 per cent being made up of the usual constituents of the ordinary dead oils of commerce, consisting almost wholly of naphtaline and its derivatives, with the basic oils parvoline, collidine, corridine, leucoline and bitumens dissolved therein." And he says further: "The merchandise as a whole is an oily body and complicated mixture of complex chemical compounds, and also a product of coal tar eliminated by distillation."

Dr. Kern, for the Government, is the only witness who testifies that this merchandise may be classed as a distilled oil, but he also admitted that it is in fact a product of coal tar and may be so properly described. Attention is called to a few questions asked this witness upon that point, and his answers thereto (Tr., p. 136):

> Q. Then you say, doctor, that this substance is, in fact, a product of coal tar?
>
> A. Yes, sir; it is a product of coal tar.
>
> Q. And it would not be improper to describe it as such, speaking of it generally—to say that this substance in controversy is a product of coal tar?
>
> A. This is a product of coal tar, yes.
>
> Q. Why do you say it is a distilled oil?
>
> A. On account of its being obtained by distillation * * *
>
> Q. You say it is known as a distilled oil because it is obtained by distillation. Is that the only reason you can give?
>
> A. Yes, sir.
>
> Q. That is the only reason you have?
>
> A. It is known in the market as that.
>
> Q. It is known in the market as a distilled oil?
>
> A. As a creosote oil.

Q. As a distilled oil?

A. It is obtained by distillation.

Q. It is known in the market as creosote oil or dead oil, is it not?

A. Yes, sir.

Q. *Is it known in the market as a distilled oil?*

A. Well, no; I guess not.

The results obtained by distilling coal tar can be more readily understood by referring to the testimony of Professor Price (Tr., p. 69), which is substantiated by all the other witnesses in the proceeding, and is as follows:

Q. Is this substance which you have analyzed, and which is contained in the bottle marked "Petitioner's Exhibit C," known as a distilled oil in chemistry to the trade?

A. No, sir.

Q. What is that substance, Professor?

A. That is one of the products of coal tar, produced by the process of distillation—fractional distillation.

Q. Could you name some of the products of coal tar?

A. Coal tar is one of the products of the distillation of coal in the manufacture of common lighting gas. The first product of distillation is a tarry material containing more or less water. The watery solution contains the ammonia. This is allowed to settle, and the tarry material is subjected to the process of fractional distillation. The first products of distillation which come over are light oils, benzole and naphtha. The second product, on pushing the distillation still farther and increasing the temperature, would be carbolic acid, and naphthalene to a certain extent. The third product in the process of distillation, after further increasing the temperature, would be what is called creosote, which is a complex compound. There then would remain a semi-liquid mass in the retort. If the distillation is

pushed still further, there is produced what is called anthracene. There then remains in the retort pitch. Occasionally that pitch is subjected to a further distillation and a coke remains. These, roughly speaking, are the four or five products of coal tar when subjected to the process of fractional distillation, or destructive distillation, as it is sometimes called.

Q. You used the expression "light oils," Professor, when you started off with benzole and naphtha.

A. Yes, sir.

Q. Is it not true that when you apply heat to coal tar that there is not a single product that comes over from the retort except coke, that chemists do not call, by way of description, oil?

A. Yes, sir; they are all called oils.

Q. They call them all oils?

A. Yes, sir; they call them all oils.

Q. What kind of a substance is naphthalene?

A. Naphthalene is a white, solid substance.

Q. When it cools it becomes white?

A. It separates out from the oil upon cooling.

Mr. Knight.—Q. When you speak of its being a "solid substance," I suppose you mean solid at ordinary temperature?

A. Solid at ordinary temperatures, yes, and when free from any of these other mixtures, like carbolic acid.

Mr. Lake.—Q. Benzole will hold naphthalene?

A. Benzole will hold naphthalene in solution.

Q. Carbolic acid is an acid, is it not?

A. Yes, sir.

Q. That, also, is called an oil, is it not?

A. Yes, sir; it is called carbolic oil.

Q. You also call benzole an oil, do you not?

A. Yes, sir; a light oil.

Q. And naphtha you also call an oil?

A. Yes, sir.

Q. And when crude anthracene crystals come over, on the application of heat up to 270 degrees Fahrenheit, you call that an oil also?

A. Yes, sir.

Q. You also call sulphuric acid an oil?

A. Yes, sir. It is sometimes called oil of vitriol?

Q. Are you speaking of the term as used chemically or commercially?

A. I am speaking commercially. Coal tar compounds are all called oils. When describing their manufacture we simply state that when it is heated up to a certain temperature certain light oils will come over from the retort; and as the temperature is increased the next light oil will pass over. And so on in the process, by increasing the temperature, until the heavier or "dead" oil passes over, which is the creosote of commerce.

Q. With which you are familiar?

A. Yes, sir.

Q. Is the creosote of commerce known as a distilled oil, or as a product of coal tar?

A. Well, it is called creosote oil, and it is a product of the destructive distillation of coal tar.

Q. But is it known in commerce as a distilled oil?

A. No, sir; it is not.

Q. How would you, as a chemist, describe it?

A. I would describe creosote as one of the products of the destructive distillation of coal tar, and that it is itself a very complicated compound, from which you can separate innumerable substances by further treatment with alkalies and acids, and subjecting it to fractional distillation. It essentially consists, of course, of the hydrocarbon oils and carbolic acid.

Q. And anthracene?

A. And anthracene also; yes, sir.

Q. When you say the hydrocarbon oils, you include anthracene and carbolic acid?

A. Yes, sir. The composition of creosote is very complicated. It contains naphthalene, carbolic and cresylic acid, crinoline and various other complicated compounds.

Q. This creosote, of which you are now speaking, is the same substance that is contained in this bottle, "Petitioner's Exhibit C?"

A. Yes, sir.

Thus it will be seen that the primary distillates of coal tar, including the merchandise in question, are termed oils, the residuum being pitch or coke.

Attention is also directed to the testimony of the witnesses Price (Tr., p. 68), Miller (Tr., p. 99), and Kern (Tr., p. 137 et seq), which shows that there are substances known and styled "distilled oils," and that the term is applied to essential oils obtained by distillation.

If the decision of the Circuit Court is to be reversed, the Appellate Court must hold that coal tar in bulk is to be admitted free of duty, but all its distillates are subject to duty under paragraph 60 of the Act, as distilled oils. But even though it should be conceded that the article is a distilled oil, and may be properly so described, under a proper construction of paragraphs 60 and 443 of the Tariff Act of 1894, the merchandise is not subject to duty. In other words, it is appellee's contention that paragraph 60 in its general description of articles subject to duty is not more specific than paragraph 443 in its description of articles placed upon the free list. The case of Matheson vs. U. S., 71 Fed. Rep., 394, and cited in the opinion of the Board of General Appraisers, when properly understood, is not opposed to this view. That case does indeed hold that the phrase "acids used for medicinal, chemical or manufacturing purposes" found in Section 473 of the Tariff Act of 1890, when construed

with other sections of that Act, is to be regarded as a more particular expression of the legislative intention that such acids shall go free, than that they were to be subjected to duty under Section 19 of the same Act, which provided that all preparations of coal tar should be subject to duty. The Court in that case say:

> "Many acids are specifically subjected to duties by the Act" (naming them). "It is reasonable to suppose that Congress, having already subjected these acids to duty, had them under contemplation when it proposed to provide for the free entry of acids, and intending to purge the several provisions from repugnancy, used the words in question. We think the provision should be construed as intending to exempt from duty all acids used for medicinal, chemical or manufacturing purposes, except the ones that had already been specifically mentioned, and as to these, although they may be used for any of the specified purposes, they are otherwise provided for."

This of course is only the application of one of the fundamental rules for the interpretation of statutes, that particular and specific provisions will, in case of conflict, prevail over general words or general provisions of the same statute. And in accordance with this rule it is uniformly held by the courts that when a duty is imposed upon an article by a specific name, such designation will determine its classification, although there may be in the same Act of Congress other words of the same general description which would include the article in question. But that rule has no application whatever to paragraphs 60 and 443 of the Tariff Act of 1894. Section 60 provides in general terms that distilled oils, along with certain other named articles not otherwise specifically provided

for, shall be subject to a duty of 25 per cent ad valorem, while paragraph 443 provides that products of coal tar not specially provided for in the Act, shall be free from duty. The Court will observe that the words "distilled oils" in paragraph 60 is a mere descriptive phrase embracing within its description all oils produced by the process of distillation. It does not name any particular oil, but refers to many oils by a general description suggested by their mode of manufacture. The distinction between words of general description which might embrace a specific article and the specific mention of a particular thing is clearly pointed out in Solomon vs. Arthur, 102 U. S., 212, in which case the Court say:

> "The fact that certain goods belong to the class of mixed goods or of goods made of mixed material does not stamp them with the name of mixed goods, for the same description is applicable to many other kinds of goods, all having different names. It is not their name: it is merely their description."

Now, assuming for the moment that dead oil is a distilled oil, it is not specifically named anywhere in the Tariff Act of 1894, and the only ground upon which it is claimed that it is subject to duty is that it falls within the descriptive phrase found in Section 60, and which phrase is equally applicable to many other kinds of oil. But it is an undisputed fact in this case that dead oil is also a product of coal tar, and that it may just as properly be so described as to call it a distilled oil. The descriptive phrase "products of coal tar," referring as it does to many articles, is no more general than the other phrase "distilled oils." There are no other provisions in

the statute to which the Court can look for light in determining whether it was the intention of Congress that it should be classified under one section rather than the other. And this being so, under the rule laid down in Matheson vs. U. S., 71 Fed. Rep., 394, referred to in the opinion of the Board of Appraisers, the doubt must be resolved in favor of the importer. The Court in that case found, from a consideration of the whole statute, that the section admitting acids used for medicinal, chemical or manufacturing purposes free of duty, was more specific than the general provision found in another section subjecting preparations of coal tar to duty, but the Court added that if it was not correct in holding that one provision was more specific than the other "the question is one of doubt, and in cases of doubt in the construction of Customs Acts the Courts resolve the doubt in favor of the importer." And so upon either view the importer in that case was entitled to the judgment given by the Court.

But, even if the Court, after a consideration of all the evidence, in this case should find that this complex compound known as dead oil—a substance which is so unlike oil according to the public conception of oil that it will not float in water—even should the Court find that in point of fact this crude substance is a distilled oil, this finding of fact would be immaterial unless the Court could go further and say, as matter of law, that this substance is a distilled oil within the meaning of Section 60 of the Tariff Act. The real question to be determined after all is this: Did Congress intend by the use of the descriptive phrase distilled oils to include the substance known in commerce as "dead oil?"

The Tariff Act of 1883 (U. S. Statutes, 1881-83, vol. 22, p. 493 and 494) contains this provision:

> "Coal tar crude, 10 per cent ad valorem; coal tar, products of, such as naphtha, benzine, benzole, dead oil and pitch, 20 per cent ad valorem.
>
> "All preparations known as essential oils, distilled oils, rendered oils, etc., 25 per cent ad valorem."

See, also, the same distinctions made in the Tariff Act of 1897, U. S. Stats., 1897, pp. 151, 197, paragraphs 3 and 524.

Thus, Congress has recognized the distinction between oils commonly known as distilled oils and dead oil, and has shown that in its definition of the general descriptive phrase, "products of coal tar," it included the specific substance known as dead oil. In other words, Congress has declared that within the meaning of those Acts dead oil was to be deemed a product of coal tar, was to be subject to duty or not subject to duty as a product of coal tar and not as a distilled oil. So that even if it should be conceded that in a general sense the descriptive phrase distilled oil is broad enough to include the specific article known as dead oil, still it is apparent from the provisions just cited that Congress intended to use the phrase distilled oil in a more restricted sense and so as to exclude dead oil. There can be no doubt whatever that this is the true construction of that portion of the Tariff Act of 1883 just cited. Coming down to the later Act of 1890, Congress speaks generally of preparations of coal tar, but leaves out the clause found in the Act of 1883, which specifically

enumerates dead oil as one of its products. And so, also, it speaks generally of distilled oils. In this respect the phraseology of the Act of 1890 is adopted in the Tariff Act of 1894, the Act under consideration here. This Act, in paragraph 60, speaks generally of distilled oils and makes them subject to duty, and in paragraph 443 speaks generally of preparations and products of coal tar, and with certain exceptions not necessary to notice, provides that such products shall be admitted free of duty.

The tariff legislation commencing with the year 1883 is thus briefly reviewed in order to introduce a proposition of law—as a controlling rule for the interpretation of the particular statute under consideration,—that Congress, having in the Act of 1883 defined the phrase "products of coal tar" as intended to embrace the specific article known as dead oil, and having in the same Act used the phrase "distilled oils" as not intended to apply to dead oil, these phrases are to be given the same meaning in the Act under consideration. In other words, the phrase "distilled oil" is to be given the same restricted meaning which it had in the Act of 1883, and the phrase "products of coal tar" is to be given precisely the same meaning which it bore in the Act of 1883. The provision above quoted from the Act of 1883 amounts to a legislative interpretation of these two phrases, and under the well-settled and universal rule of construction the same meaning is to be given to the same phrases appearing in a later statute.

The same reason applies here which supports the other familiar rule that where an Act, or part thereof, which

has received a judicial interpretation, is re-enacted in the same terms, that construction or meaning must be considered to have the sanction of the Legislature unless the contrary appears.

23 Am. & Eng. Ency. of Law, p. 370.

Hence we have the general rule that when the Legislature of one State copies a statute of another State which in that State has received a judicial construction, the same construction is to be given to it in the State in which it is adopted. There is, however, still another reason for the rule invoked, and that is that the Tariff Act of 1893, in which the phrase "products of coal tar" is defined so as to include dead oil , as *in pari materia* with the Act now under consideration; and it is a familiar rule for the interpretation of statutes that all Acts *in pari materia* are to be construed in arriving at the meaning of a later statute in the series. The rule is thus stated (23 Am. & Eng. Ency. of Law, p. 315):

> "Expired and repealed Acts *in pari materia* with the statute to be construed may also be considered in the interpretation thereof * * * In construing a given Act the meaning of words and terms as used therein may be gathered from the consideration of other Acts *in pari materia* in which such words or terms were also used."

The proposition, broadly stated, is: That where two Acts of Congress are *in pari materia*, it will be presumed, in the absence of anything to show a contrary intent, that if the same word or phrase be used in both and a special meaning be given to such word or phrase in the

first Act, it was intended that it should receive the same interpretation in the later Act. The revenue laws of the United States, though made up of independent enactments, are to be regarded as one system. They are deemed to be *in pari materia* within the principle of the rule just announced. Thus in U. S. vs. Collier, 3 Blatchford, 325, it is said:

> "Generally a statutory enactment controls all prior usages and laws, and establishes the rule which governs the subject-matter, and its language is to be understood according to its natural and ordinary import * * * * (1 Kent's Commentaries, 7th ed., 462). The intention which forms the governing principle of the law is to be extracted from the entire enactment (Strode v. Stafford, 1 Brock., 162), and to ascertain the legislative intent Courts not only search all the provisions of the particular statute, but may look out of that to others *in pari materia*, or of a similar purport, especially in respect to the revenue laws, which, although made up of independent enactments, are regarded as one system (Wood v. U. S., 16 Peters, 342) in which the construction of any separate act may be aided by the examination of other parts and provisions which compose the system."

Now, then, for the application of these general rules to the case at bar. The Act of 1883 is a statute which is *in pari materia* with the one to be construed, and contains a legislative definition of the phrase "products of coal tar." The language of that Act is "coal tar, products of, such as dead oil," and other enumerated articles. In other words, that provision is to be construed just as if it said: "In using the phrase products of coal tar in this Act, it is the intention of Congress to include within that

general definition dead oil." Having given the phrase this definition, it is not necessary that such definition should be re-enacted in every subsequent statute. The definition may be omitted without changing the legislative meaning of the phrase. In other words, the phrase or word having been once defined, such word or phrase is to have the same meaning in every subsequent Act, unless there is other language in the subsequent Act which evinces an intention on the part of the Legislature to change the prior legislative interpretation of the word or phrase.

If these propositions are correct, it necessarily follows that the decision of the Circuit Court in this case must be affirmed. The Court is relieved from the necessity of determining the abstract proposition whether dead oil may be chemically or otherwise considered as a distilled oil, because, whether it is or not, Congress has said that dead oil shall be classed as a product of coal tar rather than as a distilled oil. Congress has said, without any reference to the scientific or chemical question involved, that for all practical purposes connected with the administration of the revenue laws of the government, dead oil shall be treated and classified as a product of coal tar.

There can be no doubt whatever as to the correctness of appellee's position upon this point, which is strengthened by the citation of an authority which seems to be conclusive. By the 23d Section of the Act of March 2, 1861, it was provided that "animals living of all kinds; birds, singing and other, and land and water fowls, should be admitted free of duty."

It will be observed that in the clause just quoted Congress speaks of animals, and it also speaks of birds. Now, in a later Act, passed May 16, 1866, it was provided "That on and after the passage of this Act there shall be levied, collected and paid on all horses, mules, cattle, sheep, hogs and other live animals imported from foreign countries a duty of 20 per cent ad valorem." In the later enactment it will be noticed the word "birds" is wholly omitted, and the general provision is that all live animals shall be subject to duty. In this state of the law the question arose as to whether canary birds were subject to duty under the latter Act. The case came before Judge Woodruff of the United States Circuit Court in New York, and was thoroughly considered by him, and decided adversely to the contention of the importer and adversely to the rule which is invoked in the case at bar. This case will be found reported in 7 Blatchford, 235. The opinion is instructive, as in it the learned Judge states with great force every consideration which can be urged against appellee's position here; and while in that case he conceded the correctness of the general rule that where the words of one Act *in pari materia* are given a restricted meaning, that the same meaning must ordinarily be given to the same words in a subsequent statute forming part of the same system, still he denied its application to the particular case before him. After quoting the particular provisions of the Act of 1861 and 1866, already referred to, he proceeds to state the contention of the importer, as follows:

> "It is therefore urged that inasmuch as Congress in this Act of 1861 named animals living of all kinds

> and in the same section also mentioned singing birds, it must be concluded that it was the intention to recognize a restricted meaning of the word 'animals,' not including birds, and to introduce and sanction such restricted meaning as a definition of the terms 'living animals' and 'live animals' when used in the laws regulating duties on imports, and that hence, when Congress, in 1866, imposed a duty of 25 per cent upon all live animals and did not also mention birds, it should be held that it was intended that the latter are still to be exempt from duty."

And then proceeds:

> "Unfortunately for the plaintiffs, the various Acts of Congress imposing duties upon imports are too full of examples of tautology and repetitions to warrant such an inference. They show very great and often quite needless particularity in enumerations accompanied by general terms plainly including the same things also mentioned in detail * * * The term 'all live animals' is clear, comprehensive and explicit. The addition of the designation of birds in a single instance in a former Act is a casual circumstance of too slight significance to warrant the Court in a practical interpolation in the later special statute of an exception to its plain import; and this is especially and conclusively forbidden, when, on recurrence to the same previous Act, and to many others on the same general subject, we find similar repetitions pervading them all through a long course of years where obviously there was no intent to introduce new definitions, or by merely giving some particulars to restrict the meaning of general terms."

There is force in his statement that the Revenue Acts of Congress are full of tautological expressions; and that the mere fact that Congress happened in one section to speak of animals and also of birds ought not to be held

as a legislative declaration upon the part of Congress that the words "live animals" found in a subsequent statute, where no mention is made of birds at all, should be given such a restricted meaning as not to include birds. This same case, however, was appealed to the Supreme Court of the U. S., and is found reported in 13 Wallace, page 162, and that Court, with the opinion of the learned Circuit Judge before it, and embodied in the argument of the Solicitor General, reversed the judgment of the Circuit Court, and in doing so, in the course of its opinion, said:

> "The Act of 1866 in its terms is comprehensive enough to include birds, and all other living animals endowed with sensation and the power of voluntary motion, and if there had not been previous legislation on the subject there might be some justification for the position that Congress did not intend to narrow the meaning of the language employed. If it be true that it is the duty of the Court to ascertain the meaning of the Legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words whenever it is found necessary to do so in order to carry out the legislative intention. And it is fair to presume, in case a special meaning were attached to certain words in a prior Tariff Act, that Congress intended that they should have the same signification when used in a subsequent Act in relation to the same subject-matter.
>
> "This Act of 1861 was in force when the Act of 1866—the Act in controversy—was passed, and it will be seen that birds and fowls are not embraced in the term 'animals' and that they are free from duty, not because they belong to the class of 'living animals of all kinds,' but for the reason that they are especially designated. It is quite manifest that Congress, adopting the popular signification of the

> word 'animals,' applied it to quadrupeds, and placed birds and fowls in a different classification. Congress having, therefore, defined the word in one Act, so as to limit its application, how can it be intended that the definition shall be enlarged in the next Act on the same subject, when there is no language used indicating an intention to produce such a result? Both Acts are *in pari materia*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first Act, that it was intended that it should receive the same interpretation in the latter Act, in the absence of anything to show a contrary intention."

The case now before the Court is one which more strongly calls for the application of the rule announced in the case quoted from. In that case it was only by construction that the conclusion could be reached that the earlier Act of 1861 gave so restricted a meaning to the words "living animals" as to exclude birds; and this construction rested entirely upon the fact that that Act spoke of living animals and also of birds, and hence it was held that it must be presumed that Congress intended to use the word animals in so restricted a sense as not to include birds. Otherwise there would have been no use in inserting the word birds in the Act. But in the case at bar there is the Act of 1883, a precise, clear, unequivocal definition of the phrase "products of coal tar." There is a clear, precise, unmistakable declaration of Congress that the phrase "products of coal tar" within the meaning of that Act included dead oil, and must be classified as such; and there being nothing whatever in any later Act showing that Congress intended any different classification of this particular article, or intended that the

phrase "products of coal tar" should be given any different construction, but, on the contrary, has emphasized its classification by the subsequent Act of 1897, above cited, the phrase must be given the same meaning in the statute of 1894. It has, in fact, acquired what may be styled a technical meaning in the revenue laws of the United States.

Appellant concludes his brief by calling the attention of the Court to the latter part of Section 4 of the Act, which provides

> "If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates."

His contention is best answered by a quotation from the opinion of Judge Morrow, delivered in the Court below. He said:

> "It is further contended by counsel for the Government that under the latter part of Section 4 of the Act under consideration, which provides that: 'If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates,' the 'creosote' in question must be subject to the duty of 25 per cent ad valorem provided for in paragraph 60. It is assumed, of course, that the merchandise in question is both a 'distilled oil' and a 'product of coal tar,' and that, therefore, the duty provided for 'distilled oil,' being the higher duty, should apply. The contention is untenable. In the first place, I am unable, as stated, to find, from the evidence, that the 'creosote' in question is a 'distilled oil.' In the second place, I do not regard the provision applicable to this case, for the simple reason that it cannot be said, strictly speaking, that there are two rates of duty which can apply to the mer-

chandise in question. If I am correct in holding that 'creosote' is a 'product of coal tar' within the meaning of paragraph 443, it then is not subject to any duty whatever, but is entitled to free entry. Under this condition of affairs, if the 'creosote' be subject to duty at all, there is, obviously, but one rate of duty which is applicable. As was aptly remarked by the Court, in Matheson & Co. v. United States, 71 Fed. R., 394, 395, 'as one (paragraph) imposes duty, and the other exempts from duty, it is obvious that Congress did not intend both provisions to apply to the same article.' "

It is respectfully submitted that the decision of the Circuit Court should be affirmed.

FRED'K B. LAKE,
Attorney for Appellee.

No. 412

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

OSWALD SOMMER,

Plaintiff in Error,

vs.

CARBON HILL COAL COMPANY, A CORPORATION, ORGANIZED UNDER THE LAWS OF CALIFORNIA, AND DOING BUSINESS IN PIERCE COUNTY, WASHINGTON,

Defendant in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States for the District of Washington, Western Division, Tacoma.

INDEX.

In the Circuit Court of the United States for the District of Washington, Western Division.

February Term, 1897.

Be it Remembered that on the 27th day of February, 1897, there was duly filed in said Circuit Court of the United States, for the District of Washington, Western Division, an affidavit and order in forma pauperis, in words and figure as follows, to-wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

OSWALD SOMMER,
Plaintiff,
vs.
CARBON HILL COAL CO.,
Defendant.

Affidavit (Forma Pauperis.)

State of Washington,
Whatcom County. } ss.

Oswald Sommer, being first duly sworn, on oath says that he is a citizen of the State of Washington, and of

the United States. That he commenced the above-entitled cause in the Superior Court of Washington, for Pierce County, and that the same was removed therefrom to this court by the defendant; that he is unable to pay the costs in this court, because of his poverty, and is unable to procure bonds for the satisfaction of the same, and that he has a meritorious cause against said defendant as stated in his complaint herein, to which he refers for the purpose of this affidavit, and that he desires because of the poverty, as herein stated, of this plaintiff an order from this Honorable Court, allowing him to proceed herein, to have witnesses summoned without costs as by statute of the United States permitted.

His
OSWALD X SOMMER.
Mark

Signed before us as witnesses:
J. L. Quackenbush.
Jacob Beck.

Signed and sworn to this day of Feb. , before me, the undersigned notary public.

[Notarial Seal] J. L. QUACKENBUSH,
Notary Public.

[Endorsed]: Filed Feby. 27, 1897. A. Reeves Ayres, Clerk.

In the United States Circuit Court for the District of Washington.

OSWALD SOMMER,
Plaintiff,
vs.
CARBON HILL COAL CO.,
Defendant.

Order (Forma Pauperis.)

This cause coming on for hearing on the plaintiff's application for an order allowing plaintiff to proceed herein, and to have witnesses summoned without costs under the statutes made and provided, and it appearing that the same should be allowed:

It is therefore ordered by this Court that the plaintiff, Oswald Sommer, may proceed herein without costs to him, and the clerk is hereby ordered to file all papers and issue all process in this cause without costs or bonds for costs being furnished by said plaintiff, and marshal is hereby ordered to serve all process herein on the part of plaintiff without costs to said plaintiff.

Feb. 27, 1897.

C. H. HANFORD,
Judge.

[Endorsed]: Filed in the U. S. Circuit Court. Feb. 27, 1897. A. Reeves Ayres, Clerk. Saml. D. Bridges, Dep.

And afterwards, to-wit, on the 7th day of July, 1897, there was duly filed in said court, in said cause, an amended complaint, in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

OSWALD SOMMER,
Plaintiff,
vs.
CARBON HILL COAL COMPANY, a Corporation Organized under the Laws of California, and Doing Business in Pierce County, Washington.
No. 507.

Amended Complaint.

Now comes the above-named plaintiff, Oswald Sommer, and complaining against the defendant, the Carbon Hill Coal Company, says:

1st.

That the said defendant is at this time, and was for the several years prior hereto, a corporation organized under the laws of California, and doing business in Pierce County, Washington, to-wit:

Owning and operating a certain coal mine known as the Carbon Hill Coal Mine, situated in Pierce County, Washington.

2d.

That the said plaintiff was, for a period of about eight years prior to and including the 22d day of June, 1896, in the employ of the said defendant at the said mine, digging and mining coal for the said defendant.

3d.

Plaintiff alleges that there are great accumulations of natural gas in the said Carbon Hill Mine, which has a tendency to fill the said mine, as the coal therein is being dug, making it impossible for operation, all of which the plaintiff well knew. And plaintiff alleges that with proper air and ventilation to the face of working places throughout the mine, as is required of defendant company under the laws of the State of Washington, the gas is not, and would not be, dangerous to the health or to the operation of said mine.

4th.

That the laws of the State of Washington, to-wit, chapter 81, Laws of 1891, entitled "An Act relating to the proper ventilation and safety of coal mines, etc.," provides in part: "Sec. 9. The owner, agent, or operator of every coal mine, whether operated by shaft, slope, or

drifts, shall provide and maintain in every coal mine a good and sufficient amount of ventilation for such persons as may be employed therein, the amount of air in circulation to be in no case less than one hundred (100) cubic feet for each person per minute, measured at the foot of the down cast, the same to be increased at the discretion of the inspector according to the character and extent of the workings or the amount of powder used in blasting, and said volume of air shall be forced and circulated to the face of every working place throughout the mine, so that the said mine shall be free from standing powder smoke and gases of every kind."

5th

That the said defendant, in accordance with said law, had in its employ one John Lowery on the 22d day of June, 1896, for the purpose of providing the said mine with air and overseeing and conducting, guiding, and managing the ventilation of the said mine for the proper escape, and in freeing the said mine from all gases and smoke of every kind for the safety of the employees of the said defendant, commonly known as miners. That the said John Lowery was a vice-principal of the said defendant company, and known as a fire boss, and not a fellow-servant of this plaintiff.

6th.

That on the said 22d day of June, 1896, the said defendant company ordered, directed and assigned this

plaintiff, as their servant, to mine coal in a certain part of the said mine, and to drive a chute leading from the gangway, which said chute was known as number two (2), and in pursuance of said order, direction, and assignment this plaintiff did on said day proceed to the face of said chute number two, which was at a distance at that time of about one hundred and twenty-five (125) feet from the said gangway, and connected with chute number one with two crosscuts, known as first and second crosscuts. That crosscut number one is the first crosscut up said chutes from said gangway, and crosscut number two is the second and last crosscut up said chutes from said gangway. That the crosscuts are made and provided between said chutes number one and number two for the purpose of forcing air through the same to the face of the working place in said chute number two by means of canvas. That when the face of the working place in said chute extends about forty feet above the gangway, the first crosscut is then made, and the air is then changed from the gangway to the crosscut up through chute No. two about forty feet above said first crosscut, the second crosscut is then made, and the first crosscut is then closed by a canvas gate by the said fire boss, and the air forced up through chute number one through the second crosscut to the face of the working place in said chute number two for the purpose of freeing same from gases and smoke.

7th

That at about the time of the accident hereinafter complained of this plaintiff was working at the face of said chute number two, which was about forty-five (45) feet above the second crosscut and that at a short time before said accident he noticed gas accumulating at the said working place, the face of said chute number two. That said accumulation of gas was due and owing to insufficient ventilation at the said working place, and the lack of ventilation at the said working place and face of said chute was due and owing to the negligence and carelessness of the said fire boss, John Lowery, and said defendant company, in this, to-wit: 1st. That the said John Lowery fixed, managed, and arranged the canvas gate in said crosscut number one, so as to leave a wide space or opening through which a great volume of the air provided for ventilation would and did pass down and out of said chute number two,: and did not reach the face thereof, and an insufficient amount of air for ventilation was forced up said chute number one through the second crosscut to the said working place in said chute number two; and 2d. In the defendant ordering and providing crosscuts at the distances of forty (40) feet apart, whereas they should be not more than thirty (30) feet apart in their said mine, to insure ventilation and a sufficient amount of air at the face of the working places as provided by law.

That soon after noticing the said accumulation of gas this plaintiff complained to the said Lowery that there was gas accumulating at the face of the said chute number two, and notified said Lowery that said accumulation was due to an insufficient amount of air at the face of said chute, and complained to said Lowery of the opening in the said first crosscut as herein described, and then and there requested said Lowery to furnish this said working place with more air and better ventilation. But the said Lowery, vice-principal of said company, neglecting his duty in this respect, failed to fix and arrange the said canvas gate in said first crosscut, and failed and neglected to furnish the said working place in said chute number two with proper ventilation and willfully and neglectedly allowed the gas to accumulate at the face of said chute in large quantities.

That this plaintiff, in pursuance of his regular course of duty and employment, and thinking and believing that said Lowery had performed his duty according to law, and freed the face of said chute from gas, proceeded to the face of said chute for the purpose of lighting and setting off a charge of giant powder by a fuse thereto attached. And in his usual way and manner and practice in said mine, lighted a match for the purpose of lighting the said fuse, but that at the moment the match was lighted the gas which had accumulated at the face of the said chute, though the carelessness of and negligence of the said defendant company, exploded, throwing the plaintiff violently to the bottom of the said chute, burning and

mutilating the face and arms of the said plaintiff, and burning and destroying both of the said plaintiff's eyes so that the same are beyond recovery, so that the plaintiff will always remain blind during the remainder of his lifetime.

8th.

That this plaintiff has suffered great pain, and still suffers and will suffer great pain, as a result of the injuries complained about, making mental and bodily rest almost impossible.

9th.

That the accident complained of in the above paragraph was caused by the carelessness of the defendant company, in not having provided and maintained the proper circulation of air to the face of the said chute number two, the working place of this plaintiff, so that the same would be free from gas, as required by law.

10th.

That the plaintiff was a miner by trade, and that at the time of his injury was forty-three years of age, and in good bodily health and condition, and always considered a careful and cautious man in dangerous places while mining

the several years in the said Carbon Hill Mine. That he has dependent upon him for their support a wife and child. That at the time of his injury he was earning, and was physically able to earn, the sum of one hundred ($100) dollars a month at his trade as a miner, and that the said company defendant by its said acts, deeds, negligence, and carelessness, has wrongfully deprived this plaintiff of his means of support, to his damage of fifty thousand dollars ($50,000.00).

Wherefore, plaintiff demands judgment against the said defendant in the sum of fifty thousand dollars ($50,000.00), and his costs and disbursements herein.

GOVNOR TEATS,
Plaintiff's Attorney.

State of Washington, }
County of Whatcom, } ss.

Oswald Sommer, being first duly sworn, on oath says that is the plaintiff herein; has heard the above complaint read to him, and affirms that the matters and things herein stated are true.

His
OSWALD X SOMMER.
Mark.

In presence of:
August Kuchnoch.
J. L. Quackenbush.

Signed and sworn to before me this 3d day of July, 1897.

J. L. QUACKENBUSH,

Notary Public, Residing at New Whatcom, Washington.

Recd. Copy, July 6th, 1897.

Atty. for Deft.

[Endorsed]: Filed in the U. S. Circuit Court, Jul. 7, 1897. A. Reeves Ayres, Clerk. Saml. D. Bridges, Dep. Recd. Copy. J. M. Ashton, Jul. 6th, 1897.

And afterwards, to-wit, on the 26th day of July, 1897, there was duly filed in said court, in said cause a demurrer to the amended complaint, in the words and figures following, to-wit:

In the Circuit Court of the United States, for the District of Washington, Western Division.

OSWALD SOMMER,
Plaintiff,
vs.
CARBON HILL COAL COMPANY,
Defendant.
No. 507.

Demurrer to Amended Complaint.

Comes now the defendant herein and demurs to the amended complaint in this action, and as grounds for demurrer alleges:

First.

That it appears upon the face of the amended complaint that the same does not state facts sufficient to constitute a cause of action against the defendant.

Second.

That this Court is without jurisdiction to hear and determine this action.

J. M. ASHTON,
Attorney for Defendant.

I, the undersigned, counsel for the defendant in this action, do hereby certify that the foregoing demurrer to the amended complaint is not filed for the purpose of delay and in my opinion the same is well founded in point of law.

J. M. ASHTON,
Counsel for Defendant.

[Endorsed]: Due service of within, by receipt of a true copy thereof, admitted this 26th day of July, 1897. Governor Teats, Attorney for Plff. Filed July 26th, 1897. A. Reeves Ayres, Clerk.

And afterwards, to-wit on Friday, the 15th day of October, 1897, the same being the 20th judicial day of the reg

ular July term of said Court—Present the Honorable CORNELIUS H. HANFORD, United States District Judge, presiding—the following proceedings were had in said cause, to-wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

OSWALD SOMMER,
Plaintiff,
vs.
No. 507.
CARBON HILL COAL COMPANY,
Defendant.

Order Sustaining Demurrer and Judgment.

This cause coming on to be heard in open court, and at a regular term thereof, on the 13th day of October, 1897, upon the demurrer of defendant to the second amended complaint herein, and the Court, having heard the arguments of counsel on behalf of both parties, did take the matter under advisement until this the 15th day of October, 1897, when at a regular term of this court, and in open court, the Court did order and adjudge that said demurrer be, and the same is hereby, sustained. Whereupon counsel for plaintiff desired an exception, and the same was then and is hereby allowed.

Counsel for plaintiff then announced that the plaintiff would stand upon said second amended complaint.

Whereupon, it is ordered and adjudged by the Court that said demurrer thereto having been sustained, that this action be, and the same is hereby, dismissed at plaintiff's cost. To which order plaintiff excepts, and the same is allowed by the court.

Thereupon counsel for plaintiff, in open court, gave oral notice of an appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, which notice is here and now entered of record herein.

C. H. HANFORD,
Judge.

O. K.
TEATS.

[Endorsed]: Filed in the U. S. Circuit Court. Oct. 15, 1897. A. Reeves Ayres, Clerk. Saml. D. Bridges, Dep.

And afterwards to-wit, on the 27th day of October, 1897, there was duly filed in said court, in said cause, the Assignment of Errors, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Ninth Circuit.

OSWALD SOMMER,
Plaintiff,
vs.
CARBON HILL COAL COMPANY,
Defendant.

Assignment of Errors.

To the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the above plaintiff in error, Oswald Sommers, by his attorney, Govnor Teats, and says that the record and proceedings of the Court below in the above-entitled action, therein, there is material error in this:

1st. That the Court erred in sustaining the demurrer of the defendant therein to the amended complaint of the plaintiff therein, for the reason that said amended complaint states a complete cause of action against the defendant therein.

2d. That the Court erred in rendering judgment there-

in dismissing the plaintiff's action therein, for the reason that said judgment was contrary to law.

GOVNOR TEATS,
Attorney for Plaintiff in Error.

State of Washington, } ss.
Pierce County. }

Govnor Teats, being first sworn, says that he is plaintiff's attorney; that he served the above assignment of errors on the defendant, by delivering a copy of the same on its attorney, James Ashton, at his office, in Tacoma, Wash., Oct. 20th, 1897.

GOVNOR TEATS.

Signed and sworn to before me October 20, 1897.
[Seal] A. H. GARRETSON,
Notary Public, Residing at Tacoma, Wash.

[Endorsed]: Filed in the U. S. Circuit Court. Oct. 27 1897. A. Reeves Ayres, Clerk. By Saml. D. Bridges, Dep.

And afterwards to-wit, on the 27th day of October, 1897, there was duly filed in said Court, in said cause, a petition for writ of error, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Ninth Circuit.

OSWALD SOMMER,
Plaintiff,
vs.
CARBON HILL COAL COMPANY,
Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Now comes Oswald Sommer, plaintiff in error, and petitions this Honorable Court to allow a writ of error to be directed to the Circuit Court of the United States for the District of Washington, Western Division, to remove to this, the United States Circuit Court of Appeals for the Ninth Circuit, for a review thereof, the record in the case lately pending in said court below, wherein above-named plaintiff in error was plaintiff and the above-named defendant in error was defendant, and particularly the record of the judgment rendered by said Circuit Court in the said cause, wherein the said court below sustained the demurrer of the defendant to the amended complaint of the

plaintiff, and dismissed the said plaintiff's said cause at his costs; said judgment was duly entered on record therein on the 15th day of October, 1897; that plaintiff be allowed to perfect this appeal without filing a bond as required by law, and without costs and fees of the clerk or other officers of this court, upon his affidavit made and filed in this cause according to law.

Your petitioner respectfully states that he has this day filed herewith his assignment of errors committed by the Court below in said cause, and intended to be urged by your petitioner and plaintiff in error in the prosecution of this his suit in error.

Dated Oct. 27, 1897.

GOVNOR TEATS,
Attorney for Plaintiff in Error.

Order Allowing Writ of Error.

Let a writ of error in the above cause issue as prayed for in the petition, without costs or fees of clerk or other officer of this court, and without filing the necessary bonds on appeal.

Dated Oct. 27th 1897.

C. H. HANFORD,
United States District Judge and one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, presiding at the Circuit Court for the District of Washington.

State of Washington, }
Pierce County. } ss.

Govnor Teats, being first duly sworn, says that he is plaintiff's attorney, and that he served the above petition on defendant by leaving a copy of the same with James Ashton, its attorney, at his office in Tacoma, on Oct. 20th, 1897.

GOVNOR TEATS.

Signed and sworn to before me this 20th day of October, 1897.

[Seal] A. H. GARRETSON,
Notary Public, Residing at Tacoma, Wash.

[Endorsed]: Filed in the U. S. Circuit Court. October 27, 1897. A. Reeves Ayres, Clerk. By Saml. D. Bridges, Dep.

Clerk's Certificate to Transcript.

District of Washington, Western Division, }
United States of America. } ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the District of Washington, do hereby

certify the writings hereto attached to be a true transcript of the record and proceedings in case number 507, Oswald Sommer, plaintiff, vs. Carbon Hill Coal Company, Defendant, as the same remains on file and of record in my office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at my office in the city of Tacoma in said district, this the eighteenth day of November, in the year of our Lord, one thousand eight hundred and ninety-seven.

[Seal] A. REEVES AYRES,
Clerk.
By Saml. D. Bridges,
Deputy.

Writ of Error.

UNITED STATES OF AMERICA —ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States, for the District of Washington, Greeting:

Because in the record and proceeding, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Oswald Sommer, plaintiff, and Carbon Hill Coal Company, Defendant, a manifest error hath happened, to the great damage of the said plaintiff, Oswald Sommer, as by his complaint appears, and it being fit, that the error,

if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California, within thirty days from the date of this writ in the said Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 27th day of October, in the year of our Lord, one thousand eight hundred and ninety-seven, and of the independence of the United States the one hundred and twenty-second.

[Seal] A. REEVES AYRES,
Clerk U. S. Circuit Court, District of Washington.
By Saml. D. Bridges,
Deputy.

The above writ of error is hereby allowed.

C. H. HANFORD,
U. S. District Judge, presiding in said Circuit Court.

[Endorsed]: Filed in the U. S. Circuit Court. Oct. 27, 1897. A. Reeves Ayres, Clerk. Saml. D. Bridges, Dep.

Citation.

UNITED STATES OF AMERICA—ss.

To Carbon Hill Coal Company, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Washington, Western Division, wherein Oswald Sommer is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 27th day of October, A. D. 1897, and of the independence of the United States, the one hundred and twenty-second.

[Seal] C. H. HANFORD,
U. S. District Judge, presiding in said Circuit Court.

Attest: A. REEVES AYRES,
Clerk U. S. Circuit Court, District of Washington.
By Saml. D. Bridges,
Deputy.

Service of within citation is hereby accepted this 29th October, 1897.

[Seal] J. M. ASHTON,
Attorney for Defendant.

[Endorsed]: Filed in the U. S. Circuit Court. Nov. 17, 1897. A. Reeves Ayres, Clerk. Saml. D. Bridges, Dep.

[Endorsed]: No. 412. In the Circuit Court of Appeals for the Ninth Circuit. Oswald Sommer, Plaintiff in Error, vs. Carbon Hill Coal Company, a Corporation Organized under the laws of California, and doing Business in Pierce County, Washington, Defendant in Error. Transcript of Record. In Error to the Circuit Court of the United States for the District of Washington, Western Division, Tacoma.

Filed Nov. 24, 1897.

F. D. MONCKTON,
Clerk.

No. 412

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

OSWALD SOMMER,

Plaintiff in Error,

vs.

CARBON HILL COAL COMPANY, A CORPORATION, ORGANIZED UNDER THE LAWS OF CALIFORNIA, AND DOING BUSINESS IN PIERCE COUNTY, WASHINGTON,

Defendant in Error.

SUPPLEMENTAL RECORD.

In Error to the Circuit Court of the United States for the District of Washington, Western Division, Tacoma.

INDEX.

State, and that your petitioner, Carbon Hill Coal Company, was at the time of the commencement of this action, and still is, a citizen of the State of California and of no other State, having its chief office in the city of San Francisco in said State, and authorized and empowered to transact business in the State of Washington, but not a resident or citizen of said State of Washington.

Third.—That your petitioner desires to remove this suit before the trial thereof into the next Circuit Court of the United States, to be held in the Western Division of the District of Washington, and your petitioner offers herewith good and sufficient surety for its entry in the said Circuit Court of the United States on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court of the United States if said Court shall hold that this suit was wrongfully and improperly removed thereto.

Your petitioner therefore prays that the said surety and bond may be accepted; that this said suit may be removed into the next Circuit Court of the United States to be held in the District of Washington in and for the Western Division of said District, pursuant to the statutes of the United States in such cases made and provided, and that no further proceeding may be had herein in this Court.

And your petitioner will ever pray.

CARBON HILL COAL COMPANY.

By D. T. DAVIES,

Its Superintendent.

J. M. ASHTON,

Attorney for Petitioner.

State of Washington, }
County of Pierce. } ss.

D. T. Davies makes oath and says that he is the superintendent of the petitioner above named, and duly authorized and empowered to supervise and transact its business in the State of Washington, and duly authorized and empowered to sign and present the foregoing petition. That the said petition is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to these matters he believes it to be true.

D. T. DAVIES.

Subscribed and sworn to before me this 7th day of January, 1897.

ELMER E. SCHOOLEY,
Notary Public in and for the State of Washington, residing at Carbonado, Pierce County, Washington.

Filed Jan. 9, 1897. W. A. Fairweather, Clerk. By J. A. Pleasants, Deputy.

In the Superior Court of the State of Washington, in and for the County of Pierce.

OSWALD SOMMER,

Plaintiff,

vs.

CARBON HILL COAL COMPANY, a Corporation,

Defendant.

Order of Removal.

The defendant herein having, within the time provided by law, filed its petition for removal of this cause to the Circuit Court of the United States for the District of Washington, Western Division, and having at the same time offered its bond in the sum of five hundred dollars with good and sufficient surety, pursuant to statute and conditioned according to law:

Now, therefore, this Court does hereby accept and approve said bond, and accept said petition, and it is hereby ordered that this cause be removed to the next Circuit Court of the United States for the District of Washington, Western Division, pursuant to the statutes of the United States in such cases made and provided, and that all other proceedings of this Court herein be, and the same are hereby, stayed.

JOHN C. STALLCUP.

Filed Jan. 9, 1897. W. A. Fairweather, Clerk. Entered, J. 58, p. 513. Dept. 2. Jany. 9, 1897.

Clerk's Certificate.

United States of America,
District of Washington. } ss.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the District of Washington, do hereby certify that I have compared the foregoing copy with the original petition and order as shown by the transcript in said cause from the Superior Court of the State of Washington, in and for the County of Pierce, now on file and of record in my office at Tacoma, and that the same is a true and perfect copy of said original, and of the whole thereof.

Witness my hand and the seal of said Court this 25th day of February, 1898.

[Seal] A. REEVES AYRES,
Clerk.
By Saml. D Bridges,
Deputy.

[Endorsed]: Filed March 3d, 1898. F. D. Monckton, Clerk.

No. 412.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OSWALD SOMMER,
Plaintiff in Error,

vs.

CARBON HILL COAL COMPANY,
A CORPORATION,
Defendant in Error.

No. 412.

BRIEF OF PLAINTIFF IN ERROR.

In Error to the Circuit Court of the United States for the District of Washington, Western Division, Tacoma.

GOVNOR TEATS AND FREDERICK A. BROWN,
Attorneys for Plaintiff in Error.

No. 412.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OSWALD SOMMER,
Plaintiff in Error,
vs.
CARBON HILL COAL COMPANY,
A CORPORATION,
Defendant in Error.
No. 412.

BRIEF OF PLAINTIFF IN ERROR.

In Error to the Circuit Court of the United States for the District of Washington, Western Division, Tacoma.

GOVNOR TEATS AND FREDERICK A. BROWN,
Attorneys for Plaintiff in Error.

STATEMENT.

This case is here on a demurrer to the amended complaint sustained by the Court below. The amended complaint sets forth facts practically as follows:

The defendant below is a coal mining company, organized under the laws of California, and owning and operating a coal mine in Pierce County, Washington, called the "Carbon Hill Coal Mine." They have operated this mine for several years last past. (1st par. Am. Com. Record, 4–5.)

The plaintiff had for about eight years prior to the 22nd day of June, 1896, been in the employ of the defendant Company, digging and mining its coal. (Par. 2, Record, 5.) He was a miner by trade, forty-three years of age, and at the time of the accident in good health. He was always considered a careful and cautious man in dangerous places while mining the several years in the Carbon Hill Mine for the defendant in error. (Par. 10, Am. Com. Record, 11.)

There are great accumulations of natural gas in the mine which have a tendency to fill the mine as the coal is being dug (3rd Par. Am. Com. Record, 5.) To understand this fact thoroughly this Court should understand the contour of the mine and how it is worked, and we have taken the liberty to attach to this Brief a map, showing the same, as well as possibly could be made, and the facts as therein shown are described in paragraph 6 of the Amended Complaint. (Record, 6–7.) The vein of coal does not lie horizontal with the lay of the country as does most veins of coal,

but lies at an angle in the earth, having a pitch of about 45 degrees. The mining is done about this wise: After the shaft is sunk, and some mining is done, the pillars taken out, the gangway is driven further along on a level in the vein of coal, and when it reaches a point about forty feet from the last made chute, another chute is driven, which is called chute No. 1. (See map showing gangway and chute No. 1.) The chute is driven up the vein of coal leaving a pillar. Upon reaching about forty feet up the chute an air passage is driven across the pillar, connecting with the old chute, which air passage is called a cross-cut. (Marked on the map A and B.) The work of driving the chute is continued up the vein of coal for a distance of forty or forty-five feet. Then, the gangway being driven forty or more feet along the vein, past chute No. 1, chute No. 2 is driven. The air is forced to the face of the working place by a contrivance known to the miners as a "brattice," shown on the map as H and I. When the second chute reaches about forty feet up the gangway, a cross-cut is driven similar to the one in the first chute, connecting with the first chute, (marked on the map A.) This is known as cross-cut No. 1. When that is done, a gate is placed at the entrance of chute No. 1, (marked on map E,) which changes the course of the air through the first cross-cut and down chute No. 2, or up to the face of the working place in chute No. 2, by reason of the brattice which the miner arranges, and then down chute No. 2 and along the brattice, 1, to the face of the

working place in the gangway. When the miner has reached a point about forty feet up the vein of coal in the second chute from the first cross-cut, another cross-cut or air passage is made, connecting with chute No. 1, (marked on the map B.) Cross-cut No. 1 is then closed by a canvas gate (marked on the map F) and the air forced up chute No. 1 to and through cross-cut No. 2 to the face of the working place in chute No. 2. As the miner drives the chute upwards he conducts the air to the face of the working place by his canvas brattice, H. The air then goes down the chute to the working place in the gangway and out, clearing the mine of smoke and gas. The natural tendency of the gas is upwards to the face of the working place in the chute by reason, first of its lightness, and second the pressure of the air below. The tendency of the air is the way of least resistance, which is down into the gangway and out of the mine.

The laws of the State of Washington prescribe that a "volume of air shall be forced and circulated to the face of the working place throughout the mine so that the same shall be free from standing powder smoke and gases of every kind." (Par. 4, Am. Com Record, 5-6.) The law further prescribes that no less than one hundred cubic feet shall be issued per minute per man to the face of the working place, but its object is that a sufficient amount of air shall be forced and circulated to the face of the working places so as to free the same from smoke and gas.

In accordance with the laws of the State, and for the

purpose of providing a safe place for the miners to work, the defendant had in its employ one John Lowery on the 22nd day of June, 1896, whose duty it was to oversee and conduct the air and ventilation, and to provide a safe working place for the miners. He is known as a "fire boss." (Par. 5 Am. Com. Record, 6.) He fixed, managed and arranged the gates and conducted the ventilation for the safety of the miners at work. (Par. 7 Am. Com. Record, 8.)

On the 22nd day of June, 1896, plaintiff was ordered, directed and assigned to mine coal in chute No. 2, and went to work driving said chute at the face of the working place (marked on the map "O,") which was forty-five feet above the second cross-cut B, and eighty-five feet above the first cross-cut A, and one hundred and twenty-five feet above the gangway. (Par. 6, Record, 6–7.)

A short time before the accident complained of occurred, the plaintiff noticed gas accumulating at the face of the working place "O," which accumulation was due and owing to insufficient ventilation at the said face of working place. The lack of ventilation at the face of the chute was due and owing to the facts as follows:

1. The fire boss, John Lowery, managed and arranged the canvas gate in cross-cut No. 1, (marked on the map F) so as to leave a wide space or opening, splitting the air, as indicated by the arrows on the map, and a greater volume of the air passed through the opening and down and out of chute No. 2, as

indicated by the arrow on the map, and did not reach the face of the working place O where plaintiff was working, to clear the same from gas and smoke.

2. In the defendant ordering and providing cross-cuts at the distance of forty feet apart, whereas they should be not more than thirty feet apart to insure ventilation sufficient for safety at the face of the working place O. (7th Par. Am. Com. Record, 8.)

Soon after noticing said accumulation of gas, plaintiff complained to the said fire boss that there was gas accumulating at the face of said chute No. 2, and notified said fire boss that the accumulation was due to the opening in the canvas gate F in the first cross-cut, and then and there requested said fire boss to furnish his working place with better ventilation. The fire boss neglected to do his duty in this regard and wilfully and negligently allowed gas to accumulate at the face of the chute O in large quantities. (Par. 7, Am. Com. Record. 9.)

The plaintiff in pursuance of his regular course of duty and employment, and thinking and believing that said fire boss had performed his duty according to law and freed the face of said chute from gas, proceeded to the face of the working place O for the purpose of lighting and setting off a charge of giant powder by a fuse, and in his usual way and manner and practice in said mine, lighted a match for the purpose of lighting the said fuse, but the moment the match was lighted the accumulated gas exploded, throwing plaintiff violently to the bottom of the chute, burning and muti-

lating his face and arms, burning and destroying both of his eyes so that the same are beyond recovery, and making him totally blind for the remainder of his life-time. (Par. 7, Am. Com. Record, 9–10.)

Plaintiff demands judgment for $50,000 and costs.

Defendant filed a demurrer stating two grounds:

1st. That the amended complaint does not state facts sufficient to constitute a cause of action, and

2nd. Want of jurisdiction of Court below. (Record, 12–13.)

The argument and Court's decision was upon the first ground.

Upon argument of the demurrer to the Court below and after consideration, the Court sustained the same and the plaintiff excepted to the order sustaining said demurrer, and exceptions were allowed by the Court. (Record, 14–15) The plaintiff, desiring to stand on his amended complaint, gave notice in open Court of the fact, and the Court then and there dismissed the cause and rendered judgment accordingly. (Ibid p. 15.) Plaintiff took exceptions to said order of dismissal and exceptions were allowed by the Court. (Ibid p. 15.) Plaintiff gave notice of appeal in open Court, and the same was duly noticed in the order and judgment of dismissal. (Ibid p. 15.)

Plaintiff thereafter filed his assignment of errors (Record, 16,) and sued out his writ of error, which was allowed by the Honorable C. H. Hanford, United States District Judge, and one of the Judges of this Honorable Court. (Ibid p. 18–19,) and asks a reversal

of the order sustaining the demurrer and the order and judgment of dismissal of this case below.

ASSIGNMENT OF ERRORS.

Plaintiff in error assigns as material errors of record as follows:

I.

That the Court erred in sustaining the demurrer of the defendant therein to the amended complaint of the plaintiff therein for the reason that the said amended complaint states a complete cause of action against the defendant therein.

II.

That the Court erred in rendering judgment therein, dismissing the plaintiff's action therein, for the reason that the said judgment was contrary to law.

ARGUMENT.

We contend that the Court erred in sustaining the demurrer and dismissing the cause below, for the facts stated in the Amended Complaint are sufficient to constitute a cause of action for damages against the defendant Company, and then, as Chief Justice Fuller says, in Gardner vs. Mich. Cen. R. Co., "The question of negligence is one of law for the Court only where the facts are such that all reasonable men must draw the same conclusions from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." (14 Sup. Ct. Reptr. 144) It is true he was commenting upon the Court's duty upon demurrer to the evidence or motion to withdraw from the jury.

Plaintiff's Amended Complaint is exceedingly full and complete, and a multitude of witnesses could not add to the facts The Plaintiff was mining coal at the face of a chute 125 feet from the gangway. The law of Washington compelled the Company to have such a circulation of air at that place as to free it from gas and smoke. The law of Washington referred to is a part of Sec. 9, Ch. LXXXI, Laws of 1891, entitled "An Act Relating to the Proper Ventilation and Safety of Coal Mines, etc.," which is as follows:

(Sec. 9.) "The owner, agent or operator of every

coal mine, whether operated by shaft, slope or drift, shall provide and maintain in every coal mine a good and sufficient amount of ventilation for such persons as may be employed therein, the amount of air in circulation to be in no case less than 100 cubic feet for each person per minute, measured at the foot of the downcast, the same to be increased at the discretion of the inspector, according to the character and extent of the workings or the amount of powder used in blasting, and said volume of air shall be forced and circulated to the face of every working place throughout the mine so that said mine shall be free from standing powder smoke and gases of every kind."

The common law imposes this duty as well as the statute law. The fire boss split the air and only a portion reached the face of the working place in chute No. 2; gas accumulated; an explosion occurred; plaintiff was damaged. The gas exploded because of its accumulation, it accumulated because of a lack of air circulating up at the face of the working place of the chute; the lack of air was because a portion was allowed to go through the first cross-cut; the air went through the first cross-cut because of the defectively arranged canvas gate. Can it be said "That all reasonable men must draw the same conclusion" as the Court below?

While there is conflict among the authorities on many points and features on the law of negligence arising between master and servant, there is little, if any, on the point that "an obligation rests upon the

master to exercise ordinary care in providing a reasonably safe place for the servant to work, and also to use ordinary diligence in keeping it thereafter in a reasonably safe condition." (Gowen v. Bush. 76 Fed. 352.) And it is part of the contract of employment—"An obligation the more important and the degree of diligence in its performance the greater in proportion to the dangers which may be encountered." (Hough v. Ry. Co 100 U. S. 218.) There are several leading cases in the State Courts upon this point, but as they are cited and copiously copied from in the U. S. Court decisions, we will simply refer to and cite United States Court decisions.

The first of the leading cases decided by the United States Supreme Court upon this point is the Hough case cited above. This case was a critical review of the authorities upon the points, "What are the natural ordinary risks incident to the work in which the servant engages; what are the perils which in legal contemplation are presumed to be adjusted in the stipulated compensation; who within the true sense of the rule or upon grounds of public policy are to be deemed fellow-servants in the same common adventure or undertaking?"

Speaking of the exceptions to the rule of the law in relation to fellow-servants, the Court say: (p 217,) "One and perhaps the most important of those exceptions arises from the obligation of the master, whether a natural person or corporate body, not to expose the servant when conducting the master's business to

perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by the latter.... The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required One who enters the employment of another has a right to count on this duty and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation."

This case is followed in the case of N. P. R. Co, v. Herbert, 116 U. S. The Court said upon this point (at p. 648): "The servant does not undertake to incur the risks arising from the want of sufficient and skillful co laborers or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by the Courts of the highest character that it

can hardly be considered as any longer open to serious question."

The next case of note is the case of B. & O. R. v. Baugh, (13 Sup. Ct. Reptr. 914) This case is important because of the clearness of the decision. At page 922 the Court say, in approval of the Hough and Herbert cases cited above, and in relation to the point at issue: "This Court recognized the master's obligation to provide a reasonably suitable place and machinery and that a failure to discharge this duty exposed him to liability for injury caused thereby to the servant, and that it was as immaterial how, or by whom the master discharged that duty. The liability was not made to depend in any manner upon the grade of service of the co-employee but upon the character of the act itself and a breach of the positive obligation of the master."

These cases, it is true, apply to the principle of safety physical appliances, but the same principle applies as to the place the servant is to perform the work of the master. The leading case directly on this point in the U. S. Supreme Court is Gardner v. Mich. Cen. R. Co. (14 Sup. Ct. Reptr. 140.) The servant was injured by a hole in the planking where he was working at coupling cars. After citing the Hough case and reiterating the doctrine herein quoted, the Court said: (at p. 143,) "The principles are reiterated in very many authorities and among them in Snow v. R. R. Co., 8 Allen 441, referred to with approval by the Supreme Court of Michigan in this case and much in point. It

was their rule that a railroad company may be held liable for an injury to one of its servants which is caused by want of repair in the road-bed of the railroad and that if it is the duty of a servant to uncouple the cars of a train and this cannot be easily done while the train is still, and he endeavors to uncouple them while the train is in motion, and steps upon the cars and meets with an injury which is caused by want of repairs of the road-bed, the Court cannot rule as a matter of law that he is careless but should submit the case to the jury, although he continued in the employment of the company after he knew of the defect. The approximate cause of the injury was a hole in one of the planks laid down between the rails of the defendant's railroad where it crossed the highway, which had existed for more than two months to the knowledge of the plaintiff, who had complained of it to the repairers of the tracks of the railroad. The Supreme Judicial Court of Massachusetts held that the defendant was not relieved of its liability to the plaintiff by reason of any relation which subsisted between him and it at the time of the accident arising out of the employment in which he was engaged, because among other reasons it did not appear that the defect in the road was the result of any such negligence in the servant as to excuse the defendant, but was caused by a want of repair in the superstructure between the tracks of the defendant's road which defendant was bound to keep in a suitable and safe condition so that plaintiff could pass over it without incurring the risk of injury. The lia-

bility was rested on the implied obligation of the master under his contract with those whom he employs to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and renders him liable for damages occasioned by neglect or omission to fulfill this obligation, whether it arises from his own want of care or that of his agents to whom he entrusts the duty. We regard this doctrine as so well settled that in R. R. Co. v. Cox (145 U. S. 593-607) and 12th Sup. Ct. 905 we contented ourselves without discussion with a reference to some of the cases in this Court upon the subject."

The Circuit Court of Appeals have had occasion to pass on cases with facts almost identical with the facts in this case. The case of U. P. Ry. Co. v. Jarvi, 53 Fed 65, was what we might call "the falling rock case." A rock in a gangway of a mine fell and injured a miner. Judge Sanborn, rendering the opinion for the Court, said upon the point we are discussing: "It is the duty of the employer to exercise ordinary care to provide a reasonably safe place in which his employee may perform his service. It is his duty to use diligence to keep this place in a reasonably safe condition so that his servant may not be exposed to unnecessary and unreasonable risks. The care and diligence required of the master is such as a reasonably prudent man would exercise under like circumstances in order to protect his servants from injury It must be commensurate with the character of the service required and with the

dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. Obviously a far higher degree of care and diligence is demanded of the master who places his servant at work digging coal beneath overhanging masses of rock and earth in a mine than by him who places his employee on the surface of the earth where danger from superincumbent masses is not to be apprehended. A reasonably prudent man would exercise greater care and watchfulness in the former than in the latter case, and throughout all the varied occupations of mankind the greater the danger that a reasonably intelligent and prudent man would apprehend, the higher is the degree of care and diligence the law requires of the master in the protection of the servant. For the failure to exercise this care, resulting in the injury of the employee, the employer is liable; and this duty and liability extends not only to the unreasonable and unnecessary risks that are known to the employer, but to such as a reasonably prudent man in the exercise of ordinary diligence—diligence proportionate to the occasion—would have known and apprehended." The Court here cites many authorities. Then, wishing to become more complete in his statement, the Judge proceeds:

"This duty and liability rest upon the same principle and are governed by the same rules as the duty and liability to provide and keep in reasonably safe condition the machinery and tools furnished employees. While the master is not a guarantor or insurer of the

safety of the place in which he puts his servant, or of the safety of the tools or machinery he furnishes, he is in every case bound to exercise that care and diligence proportionate to the occupation and the occasion which a reasonably intelligent and prudent man would use under like circumstances, both to provide and keep in reasonably safe condition the place of work and the machinery and appliances requisite to its performance. This duty is personal to the master and cannot be so delegated as to relieve him of liability." (R. R. Co. v. Herbert, Supra)

In speaking of the care and diligence imposed upon the master in a case of this character, the Judge said: "Of the master is required a care and diligence in the preparation and subsequent inspection of such a place as a room in a mine that is not in the first instance demanded of the servant. The former must watch, inspect and care for the slopes through which and in which the servants work, as a person charged with the duty of keeping them reasonably safe would do. The latter has a right to presume, when directed to work in a particular place, that the master has performed his duty, and to proceed with his work with reliance upon this assumption unless a reasonably prudent and intelligent man in the performance of his work as a miner would have learned facts from which he would have apprehended danger to himself."

One Norman was injured by a defective plank in the flooring of the freight shed where he was working and sued for damages. (Norman v. Wabash R. Co. 62 Fed.

727.) The Circuit Court of Appeals for the Sixth Circuit approved the above case and said upon the point of law governing the duties between employer and employee as to a safe place for performing the work, as follows:

"The law governing the reciprocal duties of employer and employee with reference to the safe condition of the place where the employee is to work or of the machinery and tools with which he is to do his work is well settled. It is the duty of the employer to exercise ordinary care to provide and maintain a reasonably safe place in which the employee is to perform his services, so that the employee shall not be exposed to unnecessary and unreasonable risks. The employee has a right to presume, when directed to work in a particular place, that reasonable care has been exercised by his employer to see that the place is free from danger, and in reliance upon such assumption may discharge his duties in such place, unless there are obvious dangers which would lead a reasonably prudent employee either to refuse to work in the place, or to make complaint of the same to his master."

The nice questions arising in the cases where the damage was the result of negilgent foremen, superintendents, or those in charge of distinct departments, cannot come in a case of this character to call for close distinction and intricate points of law. There may be a question of contributory negligence, but that cannot be settled by demurrer; it must be left to the jury. The question is upon the character of the work

done by the negligent person. His general duties may be those of a fellow servant yet if he is entrusted with furnishing a safe place to work or safe machinery to another employee to work with, he is performing the duty of the employer as a vice-principal.

"It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those at least in the same work or employment, with whose habits, conduct and capacity he has in the course of his duties an opportunity to become acquainted and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business nor is it one which the servant in legal contemplation is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has ordinarily no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master. . . . The agents who are charged with the duty of supplying safe machinery are not in the true sense of the rule relied

upon to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them even when the same person renders service by turns in each, as the convenience of the employer may require." (Hough v. Ry. Co. Supra, pp. 217–219.)

The principle here laid down is followed by the Supreme Court of the United States in the Gardner case, and also in the case of B. & O. R. Co. v. Baugh, supra, in which Justice Brewer very clearly states, at p. 921:

"Again, a master employing a servant impliedly engages with him that the place in which he is to work or by which he is to be surrounded shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools or the machinery than such as is obvious and necessary. Of course some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guarantee of safety but it does require that reasonable precautions be taken to

secure safety, and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others that does not change the nature of obligations to the employee, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master."

The Justice approves the language of Justice Valentine of the Supreme Court of Kansas, in R. R. Co. v. Moore, 29 Kan. 632-644, and quotes: "And at common law, whenever the master delegates to any officer, servant, agent or employee, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent or employee stands in the place of the master, and becomes a substitute for the master, a vice-principal, and the master is liable for his acts or his negligence to the same ex'ent as though the master himself had performed the acts or was guilty of the negligence"

It is the employer who furnishes the place for the employee to work and the tools he is to work with. Who would furnish these if the employer did not? He

is the source of these necessary things. Without a place to work for the employer and without appliances to work with there can be no relation of master and servant existing between the employed and the employer. "If no one was appointed by the company to look after the conditions of the cars (for instance) and see that the machinery and appliances used to move and to stop them were kept in repair and in good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it, charged with that duty and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company. His negligence was its negligence and imposed a liability upon it." N. P. R. Co. v. Herbert, Supra, 652.

Here is a test of the cases of this character. If the party entrusted by the employer furnishes the safe place or the physical appliances he certainly is performing the duties of the master and not the duties of a fellow-servant.

The case of Gowan v. Bush, 76 Fed. 349, decided by the Circuit Court of Appeals of the 8th Circuit is directly in point with every question in this case. Bush was a miner at work for Gowen, a receiver of the owner of the mine. The mine generated gas, making it dangerous to work; gas accumulated; an explosion occurred and Bush was damaged. At the trial the

"Court refused to give two instructions which were asked by the receiver, which instructions were to this effect: that two of the receiver's employees, to-wit: John Murphy and James Scarratt were fellow-servants of the plaintiff; and if the explosion was occasioned by the negligence of either of these men in failing to discover the presence of gas in portions of the mine other than the place where the plaintiff was at work, then the defendant was not liable to the plaintiff for such neglect on the part of these men. A sufficient reason why neither of these instructions should have been given in the form in which they were asked is found in the fact that in so far as the duty was devolved upon these men, (John Murphy and James Scarratt) of going through the mine from time to time and inspecting it and seeing whether it was free from gas, they were discharging a personal duty of the master, which he owed to all the miners who were at work in the mine, and while discharging such personal duty of the master these men were not fellow-servants of the plaintiff, no matter what relation they may have occupied towards him when they were engaged in the performance of other and different duties. An obligation rests upon the master to exercise ordinary care in providing a reasonably safe place for the servant to work and also to use ordinary diligence in keeping it thereafter in a reasonably safe condition. This is a personal duty of the master which he cannot devolve upon another in such a way as to relieve himself from liability in case the duty is not performed, or is discharged in a negligent manner."

The Court then cites and quotes from the case of R. R. Co. v. Jarvi, supra, and ends its conclusions as follows: "It is evident, we think, that the instructions and questions were faulty and ought not to have been given for the reason that they exempted the receiver from responsibility for the negligent performance of one of his personal duties, to-wit: the duty of properly inspecting the mine and seeing that it was kept in a reasonably safe condition."

Now, let us apply the facts in this case to the law as almost universally held by the Courts and herein partially set out. The defendant in error was operating a coal mine, large quantities of gas accumulated in the mine or came out of the coal as it was mined, which would fill the mine, and made it dangerous to operate. (Rec. p. 5.) On the 22nd day of June, 1896, the company sent plaintiff in error to his working place to mine its coal. (Rec. p. 6.) That working place was 125 feet up from the gangway. All the gas of the mine in the proximity of chute No. 2 would accumulate at the face thereof. This company said to the plaintiff, in law and as part of its contract, "Go to the face of the working place of chute No. 2 and mine coal and it will be reasonably safe. A circulation of air is provided in such quantities as to free the place from smoke and gas. The duty of the fire boss is to see you safe. We have entrusted that work to a reasonably careful person and you shall be safe as far as lies in the company's power to make it so." With this contract, this

safeguard surrounding him the plaintiff in error went to the face of the working place of chute No. 2 and commenced mining coal. He soon found gas accumulating and on his way down the chute he noticed the gate in the first cross-cut partially open and a large volume of air passing down and out of the working place and not circulating at the face of the working place. (Rec. p. 8.) He notified the fire boss of the accumulation of gas and the defective gate in the first cross-cut. (Rec. p. 9.) It then became the duty of the fire boss to arrange the gate and have more circulation of air at the face of the working place of chute No. 2. Plaintiff in error had a right to depend on that duty being performed; he had a right to believe it was performed; believing the fire boss had performed his duty, he went to the working place and in his usual way lit a match to light the fuse attached to a charge of giant powder to make a blast. The fire boss had not done his duty. He negligently allowed the gate to remain open and the gas to accumulate at the plaintiff's working place. The air being split and only a portion going around through the second cross-cut, the tendency of all the gas carried on the current of the air as it passed through the mine was to accumulate at the face of chute No. 2. The gas carried on the current would naturally rush to the face of the chute and not follow down with the current that went through the opening left in the gate in the first cross-cut Here was an exceedingly dangerous condition which the fire boss must have known. It was his duty to see that

the circulation of the air in the mine should be so arranged that the gas would all be carried out, instead of being carried to the faces of the chutes, by a divided current and left there to accumulate and explode to the injury of the miners. While the fire boss was at work as such he could not in any way be a fellow-servant.

The defendant in error cited the case of Morgan v. Carbon Hill Co., 6 Wash. 577, wherein the Court is wanted to say that a fire boss is a fellow-servant to the miner. But it does not say so. The Court say that at the time of the acts complained of in that case the fire boss was not a vice-principal. Morgan and the fire boss at the time of the accident were sitting in the gangway of the mine, talking of their speculations in town lots. The fire boss lit a match to light his pipe and an explosion occurred, killing both the fire boss and Morgan. One other duty of the fire boss was in directing the men to leave their place of work when he found it dangerous. This duty is natural with his duties of inspection and of managing the air circulation in the mine, and at the face of the working places. The Court say at p. 579: "The only control, if any, that Jones as fire boss had of the men was to direct them to leave the place where they were working and go to another place if their continuance at work in the first place was in his opinion dangerous; but even if we assume that in determining that question and directing the employees by virtue of the authority so given him he would be acting as a vice-principal, it

does not follow that at the time of the accident he was engaged in the duty required of him as such vice-principal. In the situation in which he found the deceased party and the witness Williams and while they were together up to the time of the accident he had by virtue of his duties as fire boss no right whatever to control their action, consequently at that time he did not stand in any such relation to them as would make the company responsible for his acts."

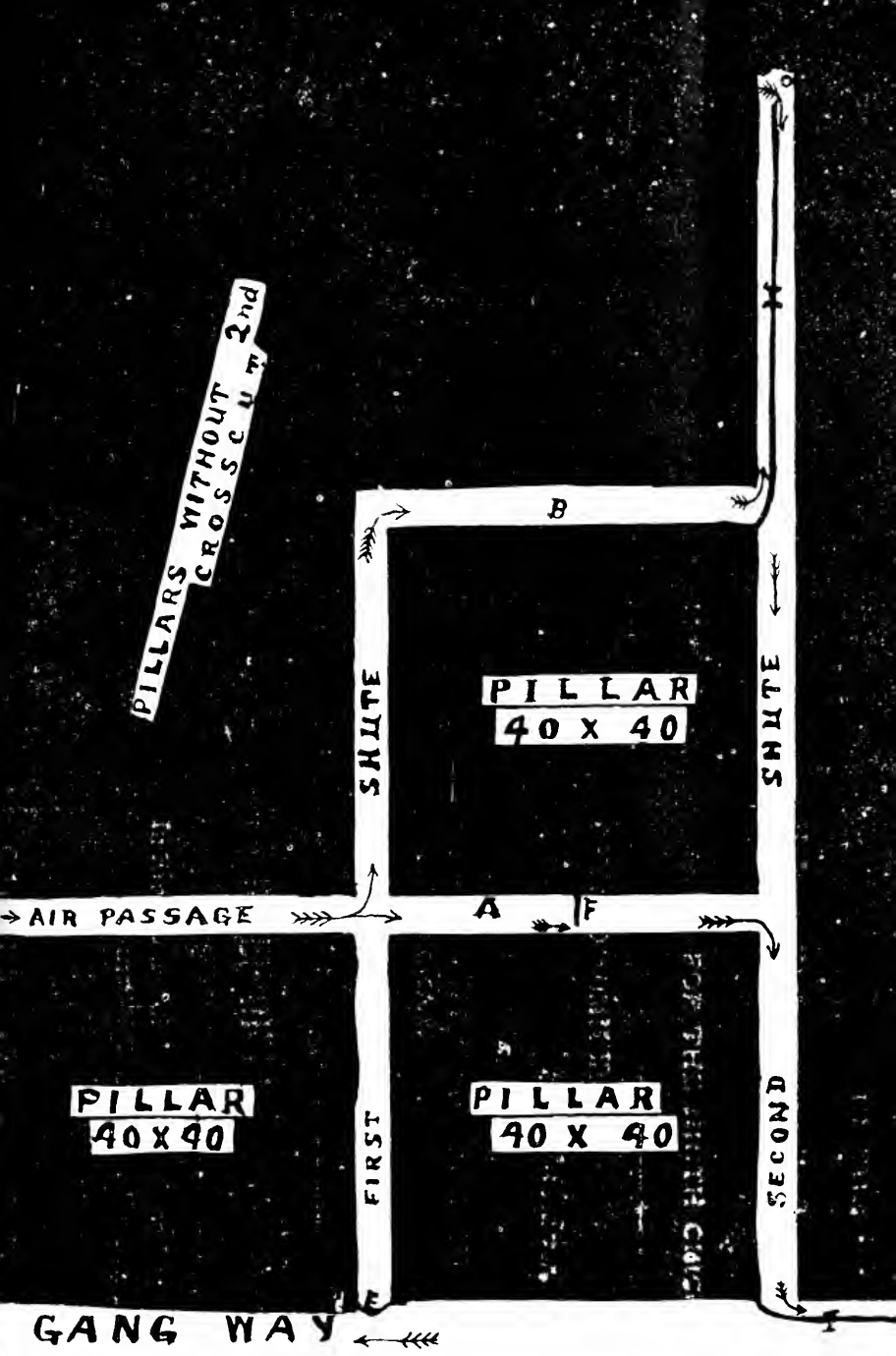
The Court seem to lay stress on "control of men" as if that had anything to do with the fundamental principles of law governing the relation of master and servant in regard to a safe place and safe appliances. This case decides nothing except that at the time of the accident the fire boss and miner were not performing their duties of employment. "Consequently at that time he (the fire boss) did not stand in any such relation to them (the miners) as would make the company responsible for his acts."

We have this much to say of this case because the Court below thought it decided as a proposition of law that a fire boss was necessarily a fellow-servant of the miners and it was his duty to follow the State Supreme Court. On both propositions the Court below was wrong. Gardner v. Mich Cen. R. Co., supra, p. 142-3, and cases cited on this point.

Under the law as declared by every decision of the United States Courts, except the Court below in this case, the duties of John Lowery as fire boss make him a vice-principal of the defendant in error. He is em-

ployed as fire boss for the "purpose of providing the said mine with air and overseeing and conducting, guiding and managing the ventilation of the said mine for the proper escape and in freeing the said mine from all gases and smoke of every kind for the safety of the employees of the said defendant commonly known as 'miners.'" (5th par. Am. Com. Rec. p. 6) Without some one to perform this work coal could not be mined for it would be death to every miner who would attempt it. Miners go into this death trap with their lives in the hands of the fire boss. A circulation of air throughout the chutes, cross-cuts, canals and gangways of the mine is as much necessary to life as it is in the pulmonary cells of the miner. The defendant company performing its duties in having a sufficient circulation of air at the face of the working places secures reasonable safety. (3rd par. Am. Com. Rec. p. 5.) That responsibility cannot be shifted so as to relieve the employer, for "the law doth give it" and the Court should have allowed it. Therein the Court below committed error, we respectfully submit.

GOVNOR TEATS and
FREDERICK A. BROWN,
Attorneys for Plaintiff in Error.



A—First Cross-cut. B—Second Cross-cut. D—Face of working place in Gangway. E—
at entrance of first Chute. F—Gate in first Cross-cut, partly open. H—Brattice in second C

.....IN THE.....

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT,

OSWOLD SOMMER, Plaintiff in Error. vs. CARBON HILL COAL COMPANY, Defendant in Error	No. 412

BRIEF

....OF....

Defendant in Error.

In Error to the Circuit Court of the United States for the District of Washington, Western Division.

JAMES M. ASHTON,

Attorney and Counsel for Defendant in Error.

B. L. ALDRICH, JR., PRINTER, 522 & 523 CALIFORNIA BUILDING, TACOMA.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT,

OSWOLD SOMMER, Plaintiff in Error. vs. CARBON HILL COAL COMPANY, Defendant in Error	No. 412

Brief of Defendant in Error.

The Defendant in Error controverts the statement of this case as set forth in the brief of Plaintiff in Error, and respectfully submits the following as a succinct statement of the questions involved in this action, and in the manner in which they are raised:—

STATEMENT OF CASE.

This case is before this court on demurrer to the amended complaint and involves but two questions:

1st. Does the amended complaint state facts sufficient to constitute a cause of action?

2d. Had the Court below jurisdiction of the case?

It did not become necessary for the court below to determine the second question as it decided that it appeared from the face of the complaint that the same did not state a cause of action.

An abstract of the facts stated in the amended complaint is

That defendant in error on June 22nd, 1896, was operating a coal mine in Pierce county, State of Washington. The plaintiff in error was at work as a coal miner in the mine on that date, and had been so working for eight years prior thereto. The mine generated gas, which is not dangerous, provided air and ventilation to the face of the working places is maintained pursuant to the laws of the state, which require 100 cubic feet of air per minute for each person in the mine. This volume of air must be increased if in the opinion of the State Coal Mine Inspector an increase is necessary, and it must be forced to the face of every working place.——See ¶4 of Am. Comp. page 6 of Record.

That defendant in error had in its employ a man named John Lowery who was known as a Fire Boss and who was employed for the purpose of providing the air and overseeing, conducting, guiding and managing the ventilation and in freeing the same from gas.——See ¶5 Am. Comp. p. 6 Record.

That on the above date, plaintiff in error was mining coal at a place known as the Face of Chute Number 2, which chute was 125 feet from the gang-

way and connected with Chute Number 1 by two crosscuts.

That these crosscuts are driven between the Chutes at intervals of about 40 feet.

That the air is forced through the last crosscut or the one nearest the working place to that place; the crosscut next below being closed by the Fire Boss by means of a Canvas Gate across the lower crosscut, which forces the air up the most practicable chute and and through the last crosscut to the working place clearing it of gas and the smoke which is made by the miners in blasting or shooting the coal..——See ¶6 Am. Comp. page 7 Record.

That plaintiff in error before his injury noticed that gas was accumulating where he was working because of insufficient ventilation, and this was because Lowery left an opening in this Canvas Gate through which the air was escaping without reaching the place where Sommer was at work, and because the crosscuts were driven 40 feet apart when they should have been not over 30 feet.

That Sommer went and complained to Lowery about the ventilation, and then returned to his work, believing Lowery would fix the gate, that Lowery failed to do so, and Sommer, in firing a shot in this place, without seeing that Lowery had done as requested, and without his promise to do so was injured by the gas exploding.——See ¶7, Comp., pages 8 and 9 of Record.

That the injury was because defendant in error

did not supply enough air at the place of injury to keep it clear of gas. That plaintiff was in good health; careful and cautious in dangerous places while mining for several years in this mine. That he has been damaged in the sum of $50,000. To this state of facts the defendant in error demurred, raising the two points first above stated, and the demurrer was sustained. —— See pages 12, 13 and 14 of Transcript.

ARGUMENT.

With all due respect to the opposite counsel, I want to say a few words about the extraordinary proceeding of MANUFACTURING ALLEGED FACTS for this court entirely outside of those in the complaint in question. I refer to the Map which has been boldly embodied in the brief of plaintiff in error. Were it properly there, it should not be considered, because it is grossly misleading and inaccurate in every particular, except in those which opposing counsel apparently wish to press into the case in any event. Such a map forms no part of the record in this court or elsewhere, and should, under every principle of practice, be disregarded and STRICKEN FROM THE FILES OF THIS COURT. It is not prepared to any scale. The length and width of passage ways and all other features of this part of the mine are not apparent nor can they be ascertained. The entire mine and surroundings of the LOCUS IN QUO are not shown. The ventilating appliances, volume of air, and the methods adopted by defendant in error in ventilating the mine must be left to conjecture. The map is not proven or authenticated in any manner,

nor can it be, as it forms no part of the complaint in question, and in fact has no existence except as a result of the unfair desires of counsel.

Coming now to the facts in the Amended Complaint and the real questions at issue:—Is it not clear that this Complaint upon its face shows two facts either or both being an absolute bar to plaintiff's re-recovery? viz.——

1. That Lowry and plaintiff were fellow servants.

2. That plaintiff prior to the injury was guilty of the grossest kind of CONTRIBUTORY NEGLIGENCE.

Taking these points in their order and assuming as must be done, but solely for the purposes of this argument that every allegation in the amended complaint is true, we find that at the time in question, Lowery was or should have been attending to this canvas curtain. That in regulating it he turned up one corner of it same as we would fold up a corner of a window shade, and that he turned it up too far, or was negligent in turning it up at all. The latest doctrine settled now by the highest courts in the land, is that the CHARACTER OF THE ACT AT THE TIME IN QUESTION is the decisive point fixing the relation of joint workers as to whether their STATUS was that of fellow-servants or otherwise. If the act be one which ordinarily must be performed by the master himself, then it matters not to whom he delegates its performance, that other is a vice-principal, and his act, if negligent, will make the master liable, it matters not what the

rank, authority, power or duties of the delegated party may be. Until the last year or two many courts, not excepting the supreme court of the United States, have been floundering in a sea of uncertainty on this fellow-servant doctrine. They have finally settled as the law what was decided by the Court of Appeals of the state of New York in 1880, in the case of Crispin & Babbitt, 81 N. Y., page 516.

The attention of the court is specially directed to this case, as it was there much more difficult to apply the true rule than in the Case at Bar. In the New York case, the party who directly caused the injury by carelessly letting on steam was the Superintendent of the Master, while in this case the man in a mine, who is known as a Fire Boss is as much a miner as a rope-rider, mule-driver, engineer, pump-tender, or any other underground workman, because his acts in guiding and watching the air, assuming (which is not the case) for this argument, that such was his duty, cannot be more than the acts of any other workman in the mines. One workman mines the coal, another guides or pushes the car in to him, another drives a mule or attends the rope cable, another attends to the pumps and keeps the water out so the miners will not drown, and another attends to the brattice cloth and cloth curtains to guide the air so the miners will not be killed with smoke or gas. Where is there is any difference? The business is extra-hazardous. The duties of one are known to the other, they are of daily, almost constant performance. Are not the risks assumed? Was such not a risk assumed beyond doubt

in this case at bar, where the complaint states that Mr. Sommer had been employed in this mine for EIGHT YEARS NEXT BEFORE THE ACCIDENT, and was considered A CAREFUL AND CAUTIOUS MINER? He knew his surroundings, tools and appliances well, and well knew the duties of those of his co-employees who manipulated those appliances.

The statement in the complaint that Lowery was "a vice-principal and not a fellow servant" does not make him one. That is the mere conclusion of the pleader. We might with the same degree of legal force and reason call a mule driver a mule boss or the engineer an engine boss and thus conclude he was a vice-principal.

In all the books there can be found but one line of duty in whicha fire boss in a coal mine figures as a vice-principal and the decisions differ on that point and that is when he makes his rounds pursuant to law early in the morning and before the miners go to work for the purpose of seeing whether or not there is standing gas in the working places or elsewhere in dangerous quantities. The leading case upon this question is: Redstone Coke Co. vs. Roby 8 Atlantic Reporter, page 593.

This is a decision of a very able court—the Supreme Court of Pennsylvania—and the court whose decisions are given great weight in these coal mine cases, as that court has for years been carefully considering and adjudicating cases of this character, on account of the large number of coal mines being oper-

ated in that state.

This decision is in principal ON ALL FOURS WITH THE CASE AT BAR, and almost so in fact. There Roby the miner was injured by his lamp igniting the "black damp" (which is the same as the gas in this case) that had accumulated where he was working because the "Mining Boss" (which is the term sometimes used in Pennsylvania, and corresponding with "Fire Boss" in Washington) had not regularly examined the mine and had not measured or kept account of the air currents. The court assuming such facts to be true said they "only prove the mining boss to have been negligent, of which fact the miners themselves had ample means of knowledge, while the owners had none," [see page 595 of decision]. On page 594 the court says—"Where the mine owners have exercised reasonable care in the selection of a competent mining boss, they are not liable for injuries resulting from his negligence. HIS CO-EMPLOYEES TAKE THE RISK OF HIS NEGLIGENCE PRECISELY AS IN OTHER CASES. If he is incompetent or careless, they can at once discover it, and notify the superintendent; while the owners, with every wish to protect the miners, have no such opportunities of information." This case also holds, as does the case of Crispin v. Babbitt SUPRA that these questions of fellow-servant, his negligence, and the assumption of that risk by the injured party, ARE QUESTIONS OF LAW FOR THE COURT TO DECIDE AND NOT OF FACT TO BE SUBMITTED TO THE JURY.

The attention of the court is particularly directed to this case of Redstone Coke Co. vs. Roby and

the cases therein cited:—The cases of Reese vs. Biddle, 112 Pa St 3 Atlantic Rep. page 813, Waddell vs. Simoson, 112 Pa St 4 Atlantic Rep page 725 are in every way in point.

These Pennsylvania cases are all considered in the light of the statutory laws of that state.——See Public Laws of Pennsylvania p 58, Act of April 18, 1877, which are similar in their purpose and effect as the laws of Washington cited and quoted in this complaint in question.——See Laws of Washington 1891, pages 152 to 163, both inclusive; or the same act found at page 773 of Vol. 1 of Hill's Statutes and Codes of Washington.

Here it should be mentioned that the AMENDED COMPLAINT DOES NOT SHOW A VIOLATION OF THESE STATUTES IN ANY MANNER by the defendant in error.

Paragraph 4 of the complaint simply quotes a a portion of the statute, paragraph 9, says the accident "was caused by the carelessness of the defendant in not having provided and maintained the proper circulation of air." There is no allegation that it did not have on hand and in operation proper machinery and appliances for that purpose. Giving the plaintiff in error the benefit of the only inference to be drawn from these allegations, we must conclude that the "carelessness of the defendant" was the carelessness of Lowery in leaving the curtain turned up, and the authorities are clear that this was the carelessness of a fellow servant, and that his careless act was one of the "assumed risks."

This is particularly true when we construe ¶s4 and 9 of the complaint in the light of the other allegations therein and such is the rule of construction—See Estee's Pleadings and Forms Vol. 1. (2nd edition) page 136, sec. 138 and cases there cited; Boone's Code Pleading [edition of 1885] page 511 and cases there cited.

If defendant in error had violated the statute in any manner, would not the State Inspector have long before this accident so ascertained and disciplined or prosecuted the defendant in error pursuant to his statutory powers.——See the statutes relating to the operation of coal mines in State of Washington SUPRA, and had he done so the amended complaint would certainly so allege.

Before leaving the argument on this point as to whether or not plaintiff and Lowery were fellow servants, and the plaintiff assuming the risks of Lowery's negligence at the curtain, I beg to call the attention of the court to the following recent State and Federal cases, all of which so decide, viz :—Jackson v. Norfolk and W. R. Co., 27, South Eastern Reporter, p. 278; Frawley v. Sheldon, 38, Atlantic Rep., p. 370; Moore Lime Co., v. Richardson's Adm' X 28, South Eastern, p. 334; Morgan v. Carbon Hill Coal Co., 34, Pacific Reporter, p. 152; Vol. 6, Washington Reports, p. 577; Schroeder v. Flint & P. M. R. Co., 61, North Western Rep. p. 663; Morch v. Toledo S. & M. Ry. Co., 71, North Western, p. 464.

The whole question is worked out and settled by the following decisions of the Supreme Court of the United States:—Northern Pacific R. R. Co. v. Hambly 154, U. S., p. 349; Central Railroad Co., v. Keegan, 160, U. S., p. 259; Northern Pacific R. R. Co., v. Chorlass, 162, U. S., p. 359; Northern Pacific R. R. Co., v. Peterson, 162, U. S., p. 346; Martin v. Atchinson, T. & Santa Fee R. R. Co., 166, U. S., p. 399; Northern Pacific R. R. v. Poirier, 167, U. S., p. 48.

I desire to urge that the case of Jackson v. Norfolk & W. R. Co., SUPRA, is worthy of the most careful examination by this court. A reading of the same will give the court a complete, comprehensive, and exhaustive view of a case the same in principle as this. The decision is by one of the strongest state courts, the Supreme Court of Appeals of West Virginia. It reviews these questions, PRO and COX, in all their bearings upon this case at bar, and arrays and analyzes the decisions of the Supreme Court of the United States, which I have cited last above.

The doctrine in the leading and latest text books, such as Brach on Contributory Negligence and Bailey's work on the Master's Liability for Injury to Servant is also judicially considered in this West Virginia case, and I respectfully request this court to read and give its usual careful consideration to the same, when I maintain that the facts and law in that case will, in reason and justice, be found to be applicable to this. Where is there any legal difference in the act of a

conductor negligently signalling, and backing a car against a brakeman, and a fire-boss negligently raising a curtain so as to permit gas to accumulate and injure a miner. The coal company here could not watch every act of this fire-boss in connection with his duties. A law requiring that of an employer would be a crying injustice.

The duties of this fire-boss, at the time in question, involved—and could only involve—acts incident to the conduct and operation of the business of mining coal. There is not a syllable in the complaint to the effect that defendant in error did not exercise reasonable care and prudence in the employment of Lowery.

It is not even alleged that he was incompetent, or that the Company knew him to be incompetent. For all that appears in the complaint the defendant in error surrounded the plaintiff with a fit and careful fire-boss, and his functions in the matter of managing, conducting and guiding the air by means of this curtain or otherwise, were purely and clearly those of mere operation. He was not in another or separate department as referred to by the Supreme Court in case of R. R. v. Peterson, SUPRA, and his act was purely that of a co-worker. These unfortunate and distressing accidents are, it seems, necessarily of frequent occurrence in coal mining, the business being extra-hazardous, more so than railroading. The place where Mr. Sommer was hurt, was originally made safe and constantly kept so by his employer as far as it

was possible to do so, considering the dangers and hazards of the business. The fact that the cross-cuts were 40 instead of 30 feet apart is not charged in the complaint as the cause of the accident, and even were it so the plaintiff in error, according to the complaint, had for a long time previous to his injury (and without complaint from him) been familiar with the location and character of these cross-cuts, and it will be conceded as elementary and settled that he assumed the risks incident to their construction or operation. But aside from this, there can be no presumption that the cross-cuts were negligently located or driven, because they were placed there under and subject to the inspection of a State Coal Mine Inspector, provided for by the very act mentioned in the complaint. Again, the court's attention is directed to the only law of Washington which exists or ever has existed on this subject of cross-cuts, and that law provides that these cross-cuts shall not be over SIXTY feet apart.——SEE SECTION 5 OF THE "ACT FOR THE PROTECTION OF PERSONS WORKING IN COAL MINES."

Laws of Washington, 1897, page 60.

From all that appears in the complaint, the brattice, curtain and all air appliances were "reasonably safe and suitable." The whole trouble seems to have been in the manipulating of these appliances by a fellow workman.

Passing to the cases of Frawley vs. Sheldon and Moore Lime Co. vs Richardson SUPRA, the reasons for these decisions will be found in point.

There can be no difference in priciple in a foreman carelessly letting a hook drop and injuring a workman or a foreman carelessly moving lime cars so they injure a fellow workman from a fire-boss negligently raising a curtain in a mine or lowering it, thereby injuring a miner.

Take the case of a switchman on a railroad and a section hand or a member of the train crew.

The switchman fails to close the switch. A section hand working on the track, or one of the crew of the train is injured in the wreck of a train resulting therefrom:—Would any person contend that the switchman was not a fellow servant of the employee injured? Still the switchman manages and regulates the switch by means of the switch bar; and in this case, the fire boss manages and regulates the air by means of a curtain.

Counsel contend that His Honor, Judge Hanford predicated his decision on the case of

Morgan vs. Carbon Hill Coal Co. SUPRA.

In this they are in error. That case was but one of the decisions bearing upon the Rules of Law which controled the judgment of the court below.

This Court in reading the decision of the Supreme Court of the State of Washington in the Morgan case, will find that the only reasonable conclusion to be drawn from the second paragraph thereof is a finding of the Court that a fire-boss

is not a vice-principal. The case of

Sayward vs. Carlson 23 Pac. Rep. p. 830

and referred to in the Morgan case will be found in point with our contention in this case.

Counsel for plaintiff in error at pages 26 and 27 of their brief make an unfair and inaccurate application of the Morgan case, because the court in that case not only held that the fire-boss at the time of accident was not a vice-principal, but the court at page 579, vol. 6, Washington reports, squarely states that Jones, the fire-boss, "HAD, BY VIRTUE OF HIS EMPLOYMENT NO RIGHT TO CONTROL THE ACTION OF THE MINERS IN THE PROSECUTION OF THEIR WORK." The court then states what the only powers of a fire-boss were, and shows clearly its inclination not to assume that a fire-boss is a vice-principal.

Assuming, purely for the sake of argument, that the court below did follow the Morgan case, and aside from the point as to whether questions of this kind are those of local law or otherwise, was His Honor, Judge Hanford not right in giving great weight to the views of the highest court in the state where the case was instituted and pending? Such is the settled practice and a well established custom in the Federal Courts,——See Packer v. Whittier, 81, Federal Rep., p. 335, and many cases there cited.

In all of the cases cited above, both Federal and State, it will be found that the negligent party occu-

pied a relation of employment to the injured person superior to that existing between a fire-boss and a miner.

Yet we find the doctrine for which we here contend, recently but finally settled by such of our ablest state courts as have had these questions before them (as they are now at bar) and by the Supreme Court of the United States in favor of and in strict accord with the decision upon the facts shown by this amended complaint, as rendered by the court below.

SECOND.

We come now to the second question arising under the first ground of the demurrer, viz :—That the facts stated in this amended complaint show the plaintiff in error was negligent, and that his negligence contributed to his injury. It is, indeed, a most serious question if it was not the direct cause of the accident.

In cases of this kind counsel should be absolutely fair, and if he can, consistently with his duty to his client, he should be liberal. I will endeavor to be so. What does the amended complaint tell us that the plaintiff did? After stating that he was a miner working for this defendant, and at this mine, for EIGHT YEARS PRIOR TO AND INCLUDING a date, which was the date of the accident [see 2nd, 5th, 6th and 7th paragraphs.], he in the 3rd paragraph tells us what he knows about the mine and its dangers.

It is evident that he must have gained this knowledge when working there, as he tells us in the same paragraph about the accumulations of gas, its tendency, and how its dangers can be avoided by proper ventilation on the part of the company, and in the 4th paragraph tells us what the statute requires in the way of air; but the pleading no where informs the Court that the air was not there, and the methods of ventilation as required by law, or that it was not maintained EXCEPT BY AND ON ACCOUNT OF THE ACTS OF LOWERY, because it is apparent from the complaint that if Lowery had not been negligent with

the curtain the air would have passed through the cross-cuts all right.

In the 5th paragraph the plaintiff, through his pleader makes Lowery the provider, overseer, conductor, guider and manager of the ventilation.

The pleader strives hard to make him a vice-principal and there closes the paragraph with a conclusion of law to the effect that he was such, while all the pleadable facts in the complaint show otherwise.

In the 6th paragraph he tells what he was doing, and describes the passage-ways in the mine, their method of construction, how the air is forced through them, and shows the use of the canvas gate.

In the 7th paragraph plaintiff informs the court just where he was working at the time of the accident, and states squarely that HE NOTICED GAS ACCUMULATING there. Then, in substance and fact, that it so accumulated because Lowery did not manipulate the canvas gate right, and thereby let a great volume of air pass away, so it did not reach his working place which thereby had an insufficient amount, and because the cross-cuts should only have been 30 feet apart.

Now, what did plaintiff do? Continuing in this 7th paragraph does he not state and show that soon AFTER NOTICING the gas he complained to Lowery and NOTIFIED HIM OF THE CAUSE, viz., the opening in the gate, and requested Lowery to furnish more air. That Lowery neglected to do so, and allowed the

gas to accumulate. That plaintiff THOUGHT and BELIEVED he had freed the place of gas, and then what do we find plaintiff doing, without looking, testing, inquiring or taking any precautions to see if Lowery had done so, and apparently without waiting for him to do so, but IN THE REGULAR COURSE OF HIS DUTY he proceeds to the place and LIGHTS A MATCH for the purpose of SETTING OFF A CHARGE OF GIANT POWDER. Could there be a stronger or clearer case of contributory negligence revealed by any pleading?

In the first place

THE PLEADING FAILS TO ALLEGE ANY PROMISE ON THE PART OF THE EMPLOYER TO CLOSE THE CANVAS GATE OR OTHERWISE REMOVE THE GAS EITHER THROUGH LOWERY OR OTHERWISE.

It has long been well established law, that it is negligence on the part of an

EMPLOYEE AFTER KNOWING OF DANGER, TO RETURN TO THE POINT OF DANGER, WITHOUT NOT ONLY A PROMISE BY OR ON THE PART OF THE EMPLOYER TO REMOVE THE DANGER, BUT THE EMPLOYEE MUST WAIT A REASONABLE LENGTH OF TIME TO PERMIT OF THAT BEING DONE, AND UNLESS HE ALLEGES OR PROVES THAT THE EMPLOYER INFORMED HIM THAT IT WAS DONE, HE MUST FURTHER WHEN RETURNING EXERCISE SUCH CARE AND PRUDENCE AS A REASONABLY PRUDENT MAN WOULD ORDINARILY EXERCISE UNDER THE CIRCUMSTANCES TO SEE THAT THE DANGERS OR DEFECTS, AS THE CASE MAY BE, HAVE BEEN REMOVED OR

CURED.

Did the plaintiff in error do this? Does not the complaint expressly show that he did not? Does it not show that he did just the reverse?

Instead of applying the general rule and construing the pleading against the pleader, let us give him the benefit of every doubt and say that he did wait a reasonable time before returning if he ever went far enough away to be out of the gas. The fact remains that he did not secure Lowery's promise to remedy the ventilation, NOR DOES THE COMPLAINT ALLEGE THAT SUCH A PROMISE WAS GIVEN BY LOWERY OR OTHERWISE. THIS IN ITSELF MAKES IT IMPOSSIBLE FOR THE COURT TO DO OTHERWISE THAN SUSTAIN THE DEMURRER.

The complaint does not allege that plaintiff in error took any precautions when returning. Nor does it allege that the dangers appeared to be removed.

IF PLAINTIFF COULD [as he says he did] DISCOVER THE GAS BEFORE GOING TO LOWERY, COULD HE NOT DISCOVER IT AFTER RETURNING AND BEFORE LIGHTING A MATCH TO FIRE A BLAST? *THAT IS SELF-EVIDENT.*

The Morgan case SUPRA, is in point on this question of contributory negligence, also the well considered case of JACKSON V. NORFOLK & W. R. Co., SUPRA.

And see

Stiles v. Richardson, et al., 46, Pacific Reporter, p. 694,

And the case of

Blankenship v. Galveston Ry. Co., 38, South Western Repr., p. 216.

The court is requested to read the text of this case, as there the question arose on a demurrer to the complaint, the plaintiff refusing to amend same as here.

See :

Muss v Rafsnyder 35 Atlantic Rep p 9 58.
Toohey v Equitable Gas Co. 36 Atlantic Rep p 314
Central Law Journal No. 5 Vol. 46 p 79

and the comments there made on the recent case of Illinois Steel Co's vs. Mann, decided by the Supreme Court of Illinois——See case of Burns v Windfall Manufacturing Co. 45 North Eastern Rep's p 188.

The Court is requested to read each of the above cases, as they will be found in point and give much assistance in arriving at a just conclusion in this case.

The most recent Federal cases, showing facts similar or deciding questions which, in principle and law, are the same as the case at bar, are:

Texas & P. Ry. Co. v. Rodgers,
decided by the Circuit Court of Appeals
for the Fifth Circuit, June 27th, 1893,
57 Federal Reports 378

In the case of Northern Pacific R. R. v. Charless this Court decided that a servant cannot recover against his master, when he was not in the exercise of due care at the time of the accident, even if the injury was caused through the negligence of the master, and the Supreme Court of the United States in reviewing the Charless case [see that case in Supreme Court cited SUPRA] did not disturb the doctrine so established by this court and could not rightfully do so because it is the law.

See :

Vol. 7, U. S. App. (9th Cir.) p. 359, or
51, Federal Rep., p. 562,

And in my judgment this court would never have been reversed in the Charless case if the Supreme Court had not fallen into error in the case of

R. R. Co. vs. Ross, 112 U. S., p. 377.

The case of

Hough vs. Railway Co., 100 U. S., p. 214

Establishes clearly that this complaint does not state a cause of action. The plaintiff in error had no right to return to work without some promise by his employer, or some one acting as the employer's ALTER EGO that the ventilation would be set right. Plaintiff

assumed all risk arising from the cross-cuts AS HE KNEW, because the complaint shows that in the very nature of things HE MUST HAVE KNOWN that it was a physical impossibility for defendant in error to remove or change the cross-cuts, at least, not within any reasonable length of time.

Under the doctrine established by the case of

Tuttle v. Detroit G. H. & M. Ry., 122, U. S., p. 189.

It would seem that it must be determined that the plaintiff has to bear the consequences of all results arising from the facts which he alleges.

The court's special attention is directed to

The case of

Bunt vs. Sierra Butte Gold Mining Co., 138, U. S., p. 483,

It is almost on all fours with this case at bar, and it is so in principle. In the Bunt case the Supreme Court of the United States affirmed the decision of the Circuit Court for this circuit, which found Bunt clearly guilty of contributory negligence in sitting down right in and beneath the place of danger, after a post had been removed which supported the roof that fell upon him when so sitting. The Supreme Court said "Recklessness could hardly go farther," and that "he took the risks of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death." The Supreme

Court then cites several well-known cases theretofore decided by it any or all of which might be applied here.

Where is there any substantial legal difference between the Bunt case, and the plaintiff in error here turning back in this same gas chamber, knowing that it was dangerous with gas, and without taking any care (but BELIEVING which the law says he should not have done without a promise and reasonable time for for its fulfillment) to protect himself, and lighting a match to blast. Had he performed almost any other act at that time and place, his conduct would not appear so grossly negligent and reckless.

The case of Stiles vs. Richie SUPRA is a case of an accident in a mine, it is much in point, and there the question was on the Sufficiency of the Complaint.

Your Honors will observe that there the promise is alleged, and still the complaint held insufficient, if so, then A FORTIORI what must be the result when the promise is not alleged, and not even any facts from which it could be presumed, were such presumption permissible in the construction of pleadings.

Before concluding permit me to review, as briefly as possible, the argument of counsel for plaintiff in error.

No one will dispute the rules of law as quoted in Brief of plaintiff in error from the decisions there found, but counsel seem to go astray in the application of those rules. If there ever was a case in which "all

reasonable men will draw the same conclusion and find that (upon the facts in this complaint) there can be no recovery;" it is this case at bar. I trust the court will not be misled by the Statutes of the State, which counsel apparently dwell upon in their brief. It will be observed that it is no where properly alleged nor alleged in any way, except possibly as a conclusion of the pleader (see P. 9, of Comp.) that defendant in error violated the statutes, and did not have in circulation to and at this working place at the time, 100 cubic feet of air for each person in the mine, nor does the complaint tell us WHAT THE AIR MEASURED AT THE FOOT OF THE DOWNCAST, at or before the time of accident. I do not think the court will permit counsel to mislead by this flourish of statutory law, without alleging some facts showing a violation of such law. Again, supposing gas blew out at this place in such quantities that 100 cubic feet for each person in the mine, going by this point each minute would not remove the same. Would defendant in error be liable? Certainly not, because it had taken every reesonable precaution and had the amount of air the law required. Indeed it would have been many times more, because the statute only requires that the volume of air where it passes the foot of the down cast [i. e., where it turns to go back and out of the mine] should be sufficient to give 100 feet to each workman, and this air is split up and taken off in numerous directions by a number of these curtain gates throughout the mine, which gates must necessarily be, and are turned up to a small extent, or to a

great extent, or kept closed, as the case may be, to turn or split the air, and it follows as a self-evident fact that this manipulating of these "air switches" MUST NECESSARILY BE DONE BY THE MINERS THEMSELVES, were it reasonable to suppose that a fire-boss is a vice-principal? It is apparent that he was not so at this time, as it would be physically impossible for him to be in all places where these curtains were at the same time, or to manipulate them in any.

Again, no living soul can tell how they should be manipulated except the miner himself, and this is self-evident.

For fear of getting outside the record, I will cease this line of argument, WHICH IS TRUE: and in a case put before the court like this the court should be INFORMED OF THE FACTS but I should not do so were opposing counsel disposed to be fair in the make-up of their brief, or had they abstained from creating addenda to their complaint by means of a map, etc.

The abstract principles of law quoted by counsel at pages 9 to 17 of their brief will not be disputed by any lawyer, but if counsel will apply the law as molded by the ENTIRE DECISION from which they quote, they will find it fatal to their contentions.

Take the JARVI CASE, as reported in 53 Fed. p 65., which seems to be their strongest case, or at least the one up which they rely with the greatest force. No one will seriously controvert the position that the

facts there showed a case of doubt which could only be lawfully determined by submitting them to a jury. The facts there showed that Jarvi "did not apprehend the risk and danger".——See p 71 of opinion.

He did not know of the dangerous rock. At page 70 of opinion we find he was inexperienced with roofs, and had no means of examining the roof from which the rock fell. Are not those facts the opposite from this case at bar. Here the complaint shows clearly that Mr. Sommer DID APPREHEND the risk and danger. HE DID KNOW ABOUT THE GAS, because he complained of it before he was hurt.

He went into it again without knowing, or taking steps to ascertain that it had been removed; and in his pleading he does not state a single fact which gave him the right to "think," or "believe," or RELY UPON his request to Lowery being complied with.

No one can read Judge Sanborn's statement of the facts, nor his opinion in the Jarvi case, and earnestly say it should be applied adversely to the decision of the court below in this case. The law, as settled in the Jarvi case, can be applied however with terrific effect in this case.

See the last paragraph on page 68 of that decision, where the court says "that the servant cannot recklessly expose himself to a known danger, OR TO A DANGER WHICH AN ORDINARILY PRUDENT AND INTELLIGENT MAN would, IN HIS SITUATION, have apprehended and then recover of the master for an injury his own

recklessness caused," citing many strong cases.

Again, at page 69 of the Jarvi opinion, that a miner has no right to rely on his place of work being safe when the facts are such that a reasonably prudent and intelligent man would apprehend danger. Judge Sanborn further decides, at page 70, that the question of contributory negligence is one for the court, "when the facts are undisputed, and are such that reasonable men can fairly draw but one conclusion from them," and many strong cases are cited to sustain this rule.

These are all principles for which we seriously contend and ask to have applied in this case.

What good would it do plaintiff in error to go to trial? His proof would have to be within his allegations. The result eventually would surely be to make his recovery impossible. The only effect in such cases is to encourage and prolong the unfortunate claimant in the hope that he may recover.

The NORMAN CASE, cited at page 17 of plaintiff's brief, is purely a case of an employer NOT FURNISHING A REASONABLY SAFE place to work. It will be apparent that such is not this case.

Let us now consider the case of

Gowen v. Bush (76 Fed., p. 349),

which, in my opinion, is entitled to more consideration than any case in the brief of plaintiff in error.

It is somewhat unfortunate that this decision does not inform us whether Murphy or Scarrett was a fire-boss, but to be liberal with plaintiff and give him the best of the argument on that point, we will assume that they were; although it should be remembered that, in all these cases, there is an "inside" or "underground-boss," or "foreman," who is over and above a fire-boss, and that above him again is a "General Foreman," who works both out, and inside, and above him again a Superintendent or Manager or both.

The case of Gowen v. Bush simply decides what we have heretofore substantially conceded to be the law, that Murphy and Scarrett, when making their rounds of the mine, either early in the morning —when it is generally done—or from time to time, were discharging a personal duty of the master.

THERE IS NOT A WORD IN THE COMPLAINT AT BAR CHARGING LOWERY OR ANY ONE WITH NEGLIGENCE IN THIS RESPECT. WE LOOK IN VAIN THROUGH THIS COMPLAINT FOR ANY ALLEGATION THAT THIS MINE WAS NOT PROPERLY INSPECTED ON THE MORNING OF THE ACCIDENT, OR FROM TIME TO TIME ON THAT DAY.

Were it there, it would not help matters much, considering the knowledge and actions of plaintiff in error, as pleaded therein.

Applying the Gowan v. Bush case to the facts shown by the complaint, does it not decide that if Mr. Sommer was a CAREFUL AND CAUTIOUS MINER, FAMILIAR FOR EIGHT YEARS WITH THIS MINE, KNEW OF

ITS DANGERS FROM GAS, BOTH DURING THIS TIME AND PARTICULARLY WHEN HE WAS INJURED, he cannot recover? Does not the complaint at bar EXPRESSLY SHOW all these facts?

Further, it is not charged that anyone misled plaintiff by telling him there was no gas where he was working, or THAT IT HAD BEEN REMOVED, or THAT IT WOULD BE REMOVED.

We respectfully request the Court to consider carefully pages 350 and 351 of the Gowen v Bush decision and then apply them to the facts in this complaint.

The case of:

McPeck v Central Vt. R. R. Co. 79
Federal Rep p 590

has a bearing upon many features of this case at bar, and the attention of the court is directed thereto.

Counsel for plaintiff at page 25 of their brief state: "plaintiff in error had a right to depend on that duty—meaning Lowery's duty at the gate—being performed: he had a right to believe it was "performed."

Now I respectfully contend that such IS NOT THE LAW.

I challenge counsel to produce a single text-book or a single case, where such is held to be the law upon the facts shown by the complaint at bar.

The law on the contrary is that

HE HAD, AND HAS NO RIGHT TO SO DEPEND AND SO BE-

LIEVE WITHOUT PROVING AND ALLEGING IN HIS COMPLAINT SOME PROMISE, OR SOME ACT, STATEMENT OR CONDUCT, ON THE PART OF THE MASTER, OR SOME ONE, AN ALTER EGO FOR THE MASTER TO THAT EFFECT, AND BEFORE HE RETURNED TO WORK.

I am willing to submit this statement of the law to the judgment of any court.

ALL OF THE CASES CITED SUPRA, SUSTAIN THIS RULE.

Were it proper I might concede adversely to defendant in error every other point in this case; and this sole point that the complaint fails to allege any fact bringing the case within the law as stated is sufficient to sustain and, in fact, left the court below with no alternative except to sustain the demurrer. This court, speaking through His Honor, Judge Ross has decided the points for which we contend. I refer to the case of

Bunker Hill & S. Mining & C. Co., v. Schmelling, 79, Federal Rep., p. 263.

The Schmelling case sustains our contention that where the dangers arise right along during the prosecution of mining and under circumstances whereby the employer in the nature of things cannot constantly keep informed "at every moment of the work," he is not obliged to keep the place safe from dangers arising every moment, when the miner is working there.——[See the instruction at page 265, which met with the approval of this court.]

It also sustains our views on assumption of risks,

and that the CHARACTER OF THE ACT is what determines the status of the negligent party.——See

Page 266 and 267 of the decision in the Federal Reports in the Schmelling case.

From personal experience I know cases of this kind generally appeal involuntarily to the sympathetic nature. Courts and counsel have to set aside sentiment to be firm and apply the law. The most unfortunate feature of these cases is that the unfortunate, when injured, generally rush off and sue the employer for an extraordinary sum as in this case, instead of giving the employer an opportunity to aid the unfortunate, which all employers should do, either before or after suit and upon principles of humanitarianism, were they given the opportunity.

In conclusion: There are no fact or facts in this complaint which, IN THEIR LEGAL EFFECT, state that

1. Defendant in Error did not provide plaintiff with a reasonably safe place to work, and one as safe as the circumstances would permit, or

2. That it was negligent in employing, or in surrounding him with an incompetent or negligent fellow workman; or

3 That the appliances, as furnished, and in operation, were not reasonably safe and suitable.

The complaint is insufficient and the judgment sustaining the demurrer thereto should be affirmed.

JAMES M. ASHTON,
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